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Supreme Court of the United States

OCTOBER TERM, 1951

No. 158

THOMAS B. LILLY AND HELEN W. LILLY,
PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1951.

CERTIORARI GRANTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U.S.C.A., Fourth Circuit	1	1
Appendix to petitioner's brief	1	1
Commission's statement of disallowance	1	1
Exhibit "B"—Computation of income from City Optical Company	2	2
Exhibit "D"—Computation of income from Duke Optical Company	4	5
Issue raised by pleadings in Tax Court	6	7
Excerpts from testimony	7	8
Testimony of Thomas B. Lilly	7	8
Dr. J. D. Freeman	24	21
Dr. S. E. Koonee	36	30
Dr. Paul Black	44	37
Dr. David B. Sloan	56	45
Dr. George C. Allen	63	51
Dr. Loutch R. Hedgpath	73	58
Mrs. Helen W. Lilly	82	65
L. Thomas Duke	87	69
Emile C. Bryan	92	73
William H. Lightfoot	100	79
C. E. Simpson, Jr.	112	88
Milton E. Howell	116	91
Charles S. Lowrimore	120	94
Dr. E. Prefontaine	124	97

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 31, 1951.

Appendix to petitioner's brief—Continued
 Excerpts from testimony—Continued

	Original	Print
Testimony of—Continued		
C. R. Mills	132	103
Dr. Hugh C. Wolf	139	108
Dr. Ralph Dees	144	112
Dr. Horace G. Strickland	149	115
Dr. Shahane R. Taylor	154	119
Petitioners' Exhibit No. 19—Individual Income Tax Return 1942	161	124
Petitioners' Exhibit No. 17—Partnership return of in- come 1943	161	125
Petitioners' Exhibit No. 18—Partnership return of income 1944	162	126
Petitioners' Exhibit No. 30—Individual Income and and Victory Tax Return 1943	163	127
Petitioners' Exhibit No. 31—Individual Income Tax Return 1944	163	127
Petitioners' Exhibit No. 40—Wilmington Dispensing Sheet	164	128
Petitioners' Exhibit No. 22—Check No. 2182 payable to Dr. J. D. Freeman	167	132
Petitioners' Exhibit No. 51—City Optical Company Statements of Trade Discounts	168	132
Petitioners' Exhibit No. 52—Duke Optical Company Statement of Trade Discounts Allowed, 1943	174	140
Petitioners' Exhibit No. 53—Duke Optical Company Statement of Trade Discounts Allowed, 1944	175	141
Findings of fact and opinion	176	142
Findings of fact	176	142
Opinion, Leech, J.	180	145
Dissenting opinion, Arundell, J.	196	158
Decisions	199	160
Appendix "B" to Respondent's Brief	202	162
Respondent's Exhibit "T"—Complaint in case of United States of America vs. American Optical Co. et al. in U.S.D.C. for the Northern District of Illi- nois, Eastern Division	202	162
Docket entries	222	181
Order permitting Association of Independent Optical Wholesalers to file brief as Amicus Curiae	222	181
Motion of petitioners to strike Appendix A from respond- ent's brief	223	182
Argument and submission	224	183
Opinion, Debie, J.	224	183
Judgment	229	188
Order staying mandate	230	189
Order further staying mandate	230	189
Stipulation as to printing record	231	190
Clerk's certificate	232	191
Order allowing certiorari	234	193

[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

No. 6204

THOMAS B. LILY and HELEN W. LILLY, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition for Review of a Decision of the Tax Court of
the United States

Appendix to Petitioner's Brief

COMMISSIONER'S STATEMENT OF DISALLOWANCE

Deductions claimed in computing the net income from businesses conducted in the names of City Optical Company, Richmond Optical Company, and Duke Optical Company, representing amounts accrued for or paid to doctors have not been shown to constitute deductions allowable under the provisions of Section 23 of the Internal Revenue Code and are therefore disallowed. [Second paragraph of statement attached to Deficiency Notice to Thomas B. Lilly]

[Attached to Deficiency Notice to Thomas B. Lilly]

COMPUTATION OF INCOME FROM CITY OPTICAL COMPANY

1942

Adjustments to Net Income

Income per return of Thomas B. Lilly \$34,180.62

Add:

(a) "Trade Discounts" disallowed	\$60,714.90
(b) Leasehold improvements disallowed	2,450.39
(c) Excessive depreciation disallowed	543.33
(d) Bad debt disallowed	3,082.83
	<hr/>
	66,791.45

Income from City Optical Company adjusted \$100,972.07

Explanation of Adjustments

(a) Trade discounts deducted in return	\$63,814.36
Trade discounts allowable	3,099.46
Trade discounts disallowed	\$60,714.90

(b) The cost of the following leasehold improvements deducted in the return have been disallowed:

New store front	\$ 1,278.94
Mezzanine floor and stairs	1,171.45
Total	\$ 2,450.39

(c) Excessive depreciation as computed below has been disallowed:

Depreciation claimed in return	\$ 3,550.70
Allowable depreciation per Exhibit C	3,007.37
Excessive depreciation	\$ 543.33

(d) Bad debt representing account of Duke Optical Company deducted in business schedule attached to return has been disallowed.

[fol. 3] Income per return, Form 1065, filed in the name "City Optical Co. & Richmond Optical Co." \$ 38,508.60

Add:

(a) Trade discounts disallowed	\$61,601.95
(b) Capital expenditures disallowed	830.97
	62,432.92

Total \$100,941.52

Less:

(c) Accounts payable adjustment	\$ 32.36
(d) Additional depreciation allowable	206.11
	238.47

Income adjusted \$100,703.05

Explanation of Adjustments

(a) Trade discounts deducted in return	\$66,187.58
Trade discounts allowable	4,585.63
Trade discounts disallowed	\$61,601.95

(b) The cost of purchasing and installment of machinery and equipment deducted in the return in an amount of \$830.98 has been disallowed.

(c) To reduce income by adjustment of accounts payable control.

(d) To allow additional depreciation as follows:

Allowable depreciation per
Exhibit C \$ 4,169.57

Depreciation claimed in return 3,963.46

Additional depreciation allowable \$. 206.11

1944

Income per return filed in the name "City Optical Company" \$25,326.69

Add:

(a) Income credited to proprietors investment account \$ 2,596.26

[fol. 4] (b) Leasehold improvements disallowed 291.49

(c) Contributions eliminated 202.45

(d) Trade discounts disallowed 60,021.65

63,111.85

Total \$ 88,438.54

Less:

(e) Additional depreciation allowable \$ 283.72

(f) Decrease in gain on sale of machine 57.10

340.82

Income adjusted \$ 88,097.72

Explanation of Adjustments

EXHIBIT D

{Attached to Deficiency Notice to Thomas B. Lilly}

COMPUTATION OF INCOME FROM DUKE OPTICAL CO.

Adjustments to Net Income

1943

Income from Duke Optical Company per return
filed by Mrs. Helen W. Lilly \$ 2,393.30

Add:

(a) Excessive depreciation, disallowed	\$ 45.29
(b) Trade discounts disallowed	6,568.37
income adjusted	\$ 6,614.16 \$ 9,007.46

[fol. 5] *Explanation of Adjustments*

(a) Depreciation claimed in return \$ 294.81
 Allowable depreciation per Exhibit E 249.52

Excessive depreciation disallowed \$ 45.29

(b) Trade discounts claimed in return \$ 6,568.87
 Trade discounts allowable \$ None
 Trade discounts disallowed \$ 6,568.87

1944

Income from Duke Optical Company per return filed by Mrs. Helen W. Lilly \$ 2,469.38

Add:

(a) Credit to proprietorship account \$ 242.02
 (b) Trade discounts disallowed 4,798.35

5,040.37

Total \$ 7,509.75

Less:

(c) Intangible tax \$ 2.88
 (d) Additional depreciation 2.21

5.09

Income adjusted \$ 7,504.66

Explanation of Adjustments

(a) Adjustment of cash amount credited to proprietorship account restored to income.	
(b) Trade discounts and allowances per return \$4,798.35	
Trade discounts and allowances allowable	None

Trade discounts and allowances disallowed	\$4,798.35
---	------------

[fol. 6] THE ISSUE BEFORE THE TAX COURT

Taxpayers' allegations—

4. (d) The Commissioner has erroneously disallowed the deduction of trade discounts in the amount of \$57,062.45 in computing the net income of City Optical Company for 1942.

(i) The Commissioner has erroneously disallowed the deduction of trade discounts in the amount of \$61,601.95 in computing the net income of the partnership, City Optical Company, for 1943.

(k) The Commissioner has erroneously disallowed the deduction of \$6,568.87 in computing the net income of the Duke Optical Company for 1943.

(p) The Commissioner has erroneously disallowed the deduction of trade discounts in the amount of \$60,021.65 in computing the net income of the partnership of City Optical Company for 1944.

(r) The Commissioner has erroneously disallowed the deduction of trade discounts in the amount of \$4,798.35 in computing the net income of the Duke Optical Company in 1944.

Commissioner's Answer—

“4. Denies that the Commissioner committed the errors alleged in subparagraphs (a) to (t) inclusive of paragraph 4.”

[fol. 7]

EXCERPTS FROM TESTIMONY

DIRECT EXAMINATION OF MR. LILLY

By Mr. THIGPEN:

(Tr. p. 39) Q. Mr. Lilly, give your name and address and age for the record, please.

A. Thomas B. Lilly; age 56; address, Wilmington, North Carolina.

Q. What business are you engaged in?

A. In the optical business.

Q. How long have you been engaged in this business?

A. Since the early 1920's; I went in business myself in 1922.

Q. Where?

A. In Wilmington, North Carolina.

Q. What business did you go into?

A. The optical business.

Q. Under what name?

A. City Optical Company.

(Tr. p. 40) Q. How long have you operated the City Optical Company?

A. Since 1922.

Q. Did you ever have any branches of that business?

A. Yes.

[fol. 8] Q. Where?

A. In Fayetteville and Greensboro and Richmond.

Q. When were those branches established?

A. In Fayetteville it was established in 1936; Richmond in 1937; Greensboro in 1939.

“(Tr. p. ‘xx’)” is in reference to the pages of the Official Report of Hearing at Greensboro, January 31, to February 3, 1949.

(Tr. p. 67) Q. Mr. Lilly, how long have you been engaged in this business of City Optical Company?

A. Since 1922.

(Tr. p. 68) Q. Will you please tell the Court about trade discounts allowed? Just explain in very clear language just how you knew about them and what you did about them.

A. I can tell you from experience in a simple way. In 1922 I opened an optical business in Wilmington, North Carolina. In that section prior to that time the various doctor examined eyes. They had to furnish their own glasses. There was no shop to do the work for them.

I called on them and wanted to put in a shop and do that work for them. They said, "We would like to have a shop to do it but we buy the glasses from Baltimore, Atlanta, New York and such places and they send them to us by mail and we sell them and make a profit on them and we would have to give up the profit."

They realized that their time as physicians was mighty precious to use it as mechanics. We said, "Doctor, let us take that off your hands." And we said we would give them a trade discount and that is what we did.

(Tr. p. 68) Q. About how much did that trade discount amount to in percentage?

A. 33 and $\frac{1}{3}$ percent.

Q. Suppose you outline to His Honor a typical case of a [vol. 9] patient bringing you a prescription and how the matter was handled.

A. All right. We will say Doctor X or any doctor (Tr. p. 69) examines a man's eyes. He always lets that patient go anywhere he wants to, but they recommended us I think because of our good work. If the patient brought us that job we made the glasses, fit them to the patient's face, had them adjusted for him after that, and did the mechanical work and we kept a memorandum of that and gave the doctor a third of it.

The Court: That is to say, if you charged the patient \$30 for the glasses, you gave the doctor who sent the patient there a rebate of \$10 or you gave him \$10.

A. That is correct, yes, sir, and kept a memorandum of that and paid him that.

By Mr. THIGPEN:

Q. Mr. Lilly, over the years were you in contact with the manufacturing optical business as a whole?

A. Oh, yes, yes, sir.

Q. Do you know anything of your own knowledge now of the extent of this practice you have just outlined?

A. Yes, it was general.

Q. How long had it been going on?

A. Well, I know it has been going on—I don't know how long when I started in. I started in 1942 [1922] and it was the practice then. How long it had been going on I wouldn't know.

Q. You would say it had been the custom prior to 1922 even?

A. Oh yes. I remember doctors that I was familiar with (Tr. p. 70) going way back.

[fol. 10] Q. How did you consider these trade discounts allowed to doctors in your particular business?

A. I considered it was a trade discount that they were entitled to. In other words, we were handling their patients for them. They were their patients to begin with and we were taking that mechanical work off of them.

Q. You filled the prescription of a doctor for a pair of glasses?

A. That is right. In other words, we acted as agents for them.

Q. What effect did this arrangement have on the business of the City Optical Company?

A. It was helpful, of course.

Q. How was it helpful?

A. It was helpful in that we did get work and we were recommended by them.

Q. What effect did it have on your sales?

A. It increased them. There would not be sufficient sales without it.

Q. You said a few minutes ago that you made a memorandum of the work done for a patient of a particular doctor.

A. That is right.

Q. Were these transactions reflected on the books of the City Optical Company?

(Tr. p. 71) A. Yes, ~~free~~, absolutely.

Q. How were these payments made to doctors?

A. They were made by check in most all cases and we paid them usually on the 10th of the month following the transaction.

Q. It would have been possible for some to have been paid in cash, would it not?

[fol. 11] A. A few were paid in cash but almost all of them were paid by check.

• • • • •
(Tr. p. 72) Q. Mr. Lilly, I show you the partnership return of income of City Optical Company and Richmond Optical Company, and ask if your signature appears on that return.

A. Yes, it does.

The Court: For what period?

Mr. Thigpen: For the year 1943.

By Mr. THIGPEN:

Q. I show you the schedule attached to that return and ask that you tell us what the first 2 items are there.

A. Merchandise sales is the first one.

Q. How much?

A. \$439,658.62.

Q. What is next?

A. Sales discounts and allowance.

Q. How much?

A. \$66,187.58.

Q. What is the next entry on that return?

A. Net sales.

Mr. Thigpen: The petitioner offers in evidence, if Your Honor please, the original partnership return of City (Tr. p. 73) Optical Company, and Richmond Optical Company for the year 1943.

Mr. Maddox: Objected to on the grounds it is a self-serving declaration.

The Court: Overruled; exception; received.

[fol. 12] (The document referred to was marked and received in evidence as Petitioner's Exhibit No. 17.)

By Mr. THIGPEN:

Q. I show you the partnership return of income for the year 1944 of City Optical Company and ask if your signature appears on that return.

A. Yes, sir, it is on there.

Q. Is any other signature there?

A. Helen W. Lilly.

Q. I show you a schedule attached to that return and ask you to please identify the first 2 items and tell us what they are.

A. The first is merchandise sales.

Q. What is the total figure?

A. \$466,651.64.

Q. What is the next item?

A. Trade discounts and allowances.

Q. How much?

A. \$60,188.26.

Mr. Thigpen: Petitioner offers in evidence partnership return of City Optical Company for the year 1944 signed (Tr. p. 74) by Thomas B. Lilly and Helen W. Lilly.

Mr. Maddox: Same objection.

The Court: Same ruling; received; exception.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 18.)

The Court: That \$60,000 item and the \$66,000 item in the last received return as we recall—those figures being approximate and identified as trade discounts—are those sums [fol. 13] the sums which were paid in those respective years to the doctors under the arrangement you stated a moment ago?

The Witness: That is correct.

Mr. Thigpen: Maybe I can clarify that, Your Honor. They were accrued and in most cases paid within the year. The returns speak for themselves on an accrual basis.

By Mr. MADDOX:

Q. Mr. Lilly, I show you an individual income tax return for the year 1942 and ask if your signature is on that.

A. Yes, sir, it is.

Q. I call your attention to a schedule attached to the return and ask that you tell us what the first three items are and the amounts.

A. The first item is merchandise sales, \$370,139.77.

Q. And the next item?

A. Collection on bad accounts charged off, \$6,543.95.

(Tr. p. 75) Q. The next item?

A. Sales discounts and allowances, \$63,815.36.

Mr. Thigpen: Petitioner offers in evidence this tax return for the year 1942.

Mr. Maddox: No objection.

The Court: Received.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 19.)

[fol. 14] Cross-examination.

By Mr. MADDOX:

(Tr. p. 78) Q. Now, Mr. Lilly, prior to 1922 what was your occupation?

A. I was an apprentice in optical work.

Q. Doing substantially the same work as an apprentice that you do now as an optical company?

A. It was learning to do the same thing.

Q. Can you be more specific? Just what did you do—grind lenses?

A. Ground lenses, that is right.

(Tr. p. 79) Q. And prior to 1922 how long had you engaged in that occupation?

A. I would say about 2 years, about 1920 when I started.

Q. And by 1922 would you say you had completed your apprenticeship?

A. I had a working knowledge. Of course, as time went on—when I got in business for myself I added to that knowledge but I knew enough to run a shop.

Q. Who did you serve your apprenticeship with?

A. I started with Dan P. Galvin Optical Company in Tampa, Florida.

Q. Dan P. Galvin Optical Company?

A. He was in the optical business. It has been so long I am not sure about the style of the firm.

Q. Where was it located?

A. In Tampa, Florida.

Q. When did you go with him?

A. I don't remember those dates. I know this: I went in business in 1922 and I estimate approximately 2 years before [fol. 15] I served an apprenticeship. I can't remember the exact dates. That was a long time ago.

Q. Did you start serving your apprenticeship with him?

A. Yes.

Q. Did you continue with him until 1922?

(Tr. p. 80) A. No, sir.

Q. How long were you with Galvin; a short time or a long time?

A. It was a short time at two different times. I was there at Christmas—

Q. Then where did you go?

A. Smith & Mercer Optical Company. They are not in business any more.

Q. At that time where were they located?

A. I worked in Raleigh, North Carolina.

Q. Is there any reason you left Tampa and came to Raleigh?

A. I had in mind going into business in North Carolina. I was looking up this way.

Q. Were you from North Carolina?

A. North Carolina is my home and I intended to go in business in North Carolina.

Q. After you went into business in 1922 you continued up to the present time?

A. Yes, sir, that is right.

Q. Were there other optical companies other than Smith & Mercer, located in North Carolina at that time that you went with?

A. Yes, sir, Globe Optical Company operated in Raleigh.

Q. Any others you know?

(Tr. p. 81) A. Southerland & Holmes in Charlotte. I [fol. 16] think Southerland was always in it. That firm name changed. We always think of it as Southerland. I

think one of his partners, Pruett, got drowned while swimming.

Q. And seeking employment with Smith & Mercer Optical Company did you contact others in the field for employment?

A. I don't remember that I did at that time.

Q. Were there any other optical companies in North Carolina about that time that you recall?

A. The ones I named—that is all I recall right now. Those are the only ones that I recall.

Q. You stated that you opened a branch in Fayetteville in 1926.

A. That is right, yes, sir.

Q. Can you tell us the reason for opening the branch there?

A. Well, Fayetteville is a good town and I contacted the doctors there and got encouragement. I wanted to expand and do a larger job than I was doing. I went over there and contacted the doctors the same way that I did in Wilmington.

Q. Are your contacts for business usually with doctors?

A. Yes, sir, that is right.

Q. Commonly known as oculists?

A. Ophthalmologists, optometrists, sometimes known as oculists.

(Tr. p. 82) Q. After you opened business in Wilmington in 1922 did you keep in contact with the doctors in Wilmington?

A. Yes.

Q. How many doctors were in Wilmington at that time? [fol. 17] When we speak of doctors we mean oculists, eye doctors.

A. The number varied. I would say offhand 6 or 8 at that time.

Q. Has the number of doctors increased from time to time in Wilmington? Did you contact them from time to time?

A. No, sir, there are not as many doctors there today as there were then.

Q. But if new ones came into the city did you contact them?

A. Oh, yes, sir, that is the first thing we do when a new one comes in.

Q. That is from 1922 on?

A. That is right.

Q. You say you opened the Greensboro branch in 1939?

A. That is right.

Q. Was there any particular reason for that?

A. The same reason as the others. I felt I wanted to do a bigger job and be of more service.

Q. Were there optical companies here in Greensboro in 1939 before you opened?

A. Yes, sir, American Optical Company was the chief one (Tr. p. 83) here.

Q. Before you opened the Greensboro branch did you have any Greensboro business?

A. No, sir, I would say—I don't believe I had any, no, sir. It would be negligible anyway. I don't believe any.

Q. Is that also true with reference to Fayetteville?

A. No, sir, I sold them on the idea we could do a little [fol. 18] better work than anybody else and they shipped them to us and we would get them back.

(Tr. p. 113) Q. After you went into business in 1922 you have done that sort of thing right along, haven't you?

A. You mean call on the doctors?

Q. Yes.

A. Yes siree, absolutely.

Q. When you call on a doctor what do you usually discuss with him?

A. I discuss that we can do just a little bit better work than anybody else, and when a job gets into City Optical Company it is double-checked and goes out right.

Q. Is that the extent of your discussion with the doctor?

A. I wouldn't say that is the extent, no, sir.

Q. Tell me the rest of it. We would like to know.

A. Just what goes with selling our organization. It's just the regular selling—

Q. Do you still contact doctors today?

A. Yes, sir.

Q. Have you done so recently?

A. Oh, yes.

Q. Was the contact any different on the recent occasion than it was throughout the years 1922 to the present time?

A. Any different?

(Tr. p. 114) Q. Yes.

A. I would say it was different in that I knew them better. Your acquaintanceship certainly must mean something.

Q. Besides telling them how good you made the glasses [fol. 19] what else did you discuss with them? If you had an occasion recently you should be able to tell us.

A. We discussed the service of City Optical Company generally.

Q. Otherwise than telling them how good you make glasses, what else? Anything else?

A. We tell them that we appreciate the business that comes from them and I think they like to be appreciated. That helps a lot.

Q. In what manner does the business come from them?

A. I would say in a large number of cases a patient asks the doctor for a recommendation. The doctor never tells a patient where to carry the prescription. They can carry the prescription wherever they want to, but because of the good work they can recommend our place, especially if they ask for a recommendation.

In most cases you go to a doctor and say, "Where is a good place to get this filled," and they say, "Well, you can carry it wherever you want to but we have found the services satisfactory of this, that and the other optical company."

(Tr. p. 115) Q. Do you ask the doctor to recommend your place of business?

A. I wouldn't say I have come out and done that. I would not say in direct words, but we would like them to recommend us and we feel if we tell them what we have they are going to recommend us.

Q. You said in your direct examination that what you gave the doctor was 33 and $\frac{1}{3}$ percent.

A. Yes, sir.

Q. Is that the correct percentage?

A. That is what we usually gave them where we dispensed.

[fol. 20] Q. That is 33 and $\frac{1}{3}$ percent of what you collect from the patient?

A. That is right, that is usually what was done.

Q. Were there exceptions to the 33 and $\frac{1}{3}$ percent?

A. Very few. I think in one or two branches they charged the doctor the wholesale price plus a fitting fee.

Q. I am talking about the percentage. Isn't it true that Doctors Taylor and Strickland—you gave them 5 percent?

A. No, sir.

Q. What did you give them?

A. One third.

Q. How did you pay Doctor Strickland and Doctor Taylor?

(Tr. p. 116) A. I think they were paid with cash, Mr. Maddox.

Q. Paid with cash?

A. Paid with cash.

Q. Do you know why?

A. They requested it.

Q. Did they give you any explanation?

A. No, sir.

(Tr. p. 151) Q. Well, you testified yesterday to what you called "trade discounts allowed".

A. Yes, sir.

Q. Those are amounts that you accrued to doctors and paid to doctors?

A. That is right.

Q. Where did you get the designation of the item "trade discounts allowed"?

A. Where did I get the designation?

[fol. 21] Q. Yes. Why did you designate it "trade discounts allowed"?

A. It is a discount to the trade.

Q. Discounts to the trade?

A. Yes, sir, in other words, I just called it what it appeared to be in my mind.

Q. Did you select the designation?

A. I don't think so, Mr. Maddox. I don't even recall. It is a period of years that that has been used and I don't

recall. It is something that has been used so long I don't even recall of the term designating that.

Q. That is the name of the account in which the amounts (Tr. p. 152) are recorded, isn't it?

A. Yes, sir, and not only the name but what I considered it, a discount to the trade.

Q. By "trade" you mean doctors?

A. Yes, sir, I reckon strictly speaking—in other words, we speak of the trade generally as people that we sell to, people that buy are usually spoken of as "the trade", as I understand it.

Q. But you didn't select that name for the account?

A. I don't know.

Q. You don't know whether you did or not?

A. No, sir, I do not. That is so long ago—

The Court: He says he doesn't know. Let's go ahead.

By Mr. MADDOX:

Q. I refer you to your 1942 return, Exhibit 19, and the third item to which Mr. Thigpen called your attention. How is it designated there?

A. Sales Discounts and Allowances.

[fol. 22] Q. And referring to your 1943 return, Exhibit 17, the second item that Mr. Thigpen called your attention to, how is that designated?

A. The same way, and I imagine the bookkeeper in making it up—it would be the same thing, as I understand it. I never thought too much about names but just really what it was. (Tr. p. 158) It was synonymous, I would say.

Q. Exhibit 18, the second item that Mr. Thigpen called your attention to, how is that designated?

A. Trade Discounts and Allowances. I thought those were synonymous.

Q. They mean the same thing to you?

A. Yes, sir, they are synonymous, I would say.

Q. Did they have any special significance to you?

A. Those names?

Q. The names of the accounts?

A. The only thing that has significance to me is the account itself and any name that would designate it—

Q. From whom do you purchase your material such as lenses and frames?

A. From different places. I get some from Continental Optical Company, Shuron Optical Company—

Q. Bausch & Lomb?

A. Yes.

Q. American Optical Company?

A. Almost nothing from American Optical Company.

Q. They give you trade discounts, do they?

A. I don't know if you call it a trade discount or not. We just buy at the price they quote us.

Q. You don't know whether it is a trade discount or not? Is that your answer?

(Tr. p. 154) A. In other words, we pay—they bill it to [fol. 23] us and we pay the flat billings, in most cases. We have a cash discount. 2 percent cash discount.

Q. In your direct examination you stated that you acted as agent for the doctors.

A. That is really what it was.

Q. Tell me the circumstances under which that agency arose. How did it come about?

A. You mean back to the beginning?

Q. I want your understanding as to how you became an agent for the doctors.

A. Well, back to the beginning—starting in 1942 [1922] when I first opened the City Optical Company in Wilmington, at that time there were not nearly so many optical houses as there are today. The doctors had to order their glasses.

They were ordered from various cities—a few places in the South and more in the North. They had to do their own fitting of the frames. They bought the glasses and sold them at a profit.

They being professional men had to do a lot of mechanical work, bending frames and fitting to the face, and we would go to the doctor and tell him that he being a professional man that time could be put to operations and surgery and treatments, and we would take it off their hands.

They said, "That would be nice, but we buy glasses and sell (Tr. p. 155) them at a profit," so we suggested "We will take it off your hands and give you a trade discount."

I don't know what we called it, but that is what it was. That is pretty well the—

Q. Is that your explanation of how you became an agent?
[fol. 24] A. I would say so.

Q. And in response to my question, that is the best you can state?

A. As far as I can think now, that seems to me to cover it.

Q. That is your explanation?

A. That is right.

Direct examination of Dr. J. D. FREEMAN.

By Mr. THIGPEN:

(Tr. p. 161) Q. What is your age, Dr. Freeman?

(Tr. p. 162) A. Sixty-one.

Q. What profession are you engaged in?

A. Eye, ear, nose and throat.

Q. Outline briefly your medical training.

A. High school and University of North Carolina, and Medical College of Virginia, and post-graduate course in New York.

Q. When were you admitted to the practice of medicine?

A. 1918.

Q. Was that general practice or specialized practice?

A. General practice.

Q. When did you engage in specialized practice?

A. 1921.

Q. What was that specialized practice?

A. Eye, ear, nose and throat.

Q. What professional societies are you a member of?

A. New Hanover Medical Society; District Medical Society; Southern Medical Society; North Carolina Medical Society; Eye, Ear, Nose and Throat Society of North Carolina, and A. M. A.

[fol. 25] Q. What is A. M. A.?

A. American Medical Association; and I also belong to the Academy of Eye, Ear, Nose and Throat, a British organization, foreign organization.

Q. Are there any other professional societies that you (Tr. p. 163) are a member of that you have not already named?

A. I belong to the Academy of the Foreign Medical Society.

Q. How long have you practiced as an eye specialist?

A. I started in 1941 [1921].

Q. How long have you known Thomas B. Lilly?

A. Since around 1922.

Q. What business is he engaged in?

A. City Optical Company.

Q. Dr. Freeman, I show you this paper and ask you to look at both sides of it and tell me if your signature appears thereon at any place.

A. On the front and endorsed on the back, J. D. Freeman.

Q. That is your signature?

A. Yes, sir.

Mr. Thigpen: The petitioner offers this check as an exhibit for identification at this time.

Mr. Maddox: No objection for identification.

The Court: Let the check be marked for identification as the next numbered exhibit of the petitioner, for identification.

(Document referred marked Petitioner's Exhibit No. 22 for Identification.)

[fol. 26] By Mr. Thigpen:

Q. Now, Dr. Freeman, for what was this check paid to you?

(Tr. p. 164) A. For professional services rendered to my patients at City Optical.

Q. What is the date on that check?

A. January 10, 1944.

Q. What does that check represent?

A. Trade discount.

Q. For what period of time?

A. January, 1944.

Q. Now, Mr. Freeman, will you explain to His Honor this term "trade discounts allowed" that you have used in connection with that check? Tell us just what that represented?

A. Patients come into the office for examination of the eyes. I give them an examination and write a prescrip-

tion to the glasses and they take them to the City Optical Company and get it filled.

I always advise the patients to come back to my office for reexamination ~~so~~ I can check the lenses and see that they are perfect in every respect. If they are not I refer them back to the City Optical Company for correction.

Q. Do you recommend the City Optical Company to your patients, or do they just go there?

A. Well, I recommend them.

Q. Why?

A. Because they get excellent service. They don't have to go. They can go to other places, but if they go to the City (Tr. p. 165) Optical Company I feel like my patients get excellent service.

Q. Well, now, what sort of an arrangement did you have [fol. 27] with the City Optical Company that prompted them to send you this check for \$629.15? We will use this as an illustration.

A. Well, the patients would go there and get the glasses [glasses] and come back to me for reexamination and maybe in a month the glasses don't fit, they are out of line, and they come to me again.

I recheck them—it doesn't cost them anything at all—and I send them to City Optical Company for readjustment and the City Optical Company does not charge them anything.

Q. I wear glasses. Suppose I came to you and you examined my eyes and you gave me a prescription and I took it to City Optical Company. From there on what happens with regard to my relations with City Optical Company. Who do I pay for the glasses?

A. City Optical Company and I am responsible for the glasses.

Q. Then what happens to the sum of money I pay the City Optical Company?

A. They give me one-third off the glasses.

Q. They give you one-third of what I pay to them for the glasses?

A. Yes.

Q. How long has this arrangement been in effect?

(Tr. p. 616) A. Since 1922.

Q. Do you know of any similar arrangement with any other manufacturing opticians?

A. No.

Q. How do you consider the trade discounts that you received as, for instance, this check?

A. I thought it was fair and square as the patient certainly got the service for that.

[fol. 28] Q. And what did you do with the money?

A. I added it on my daily—They paid it on the 10th. I put it in my daily cash book as January 10, 1944.

Q. You mean February 10 or whenever the check was received?

A. Yes.

Q. You entered it on your cash book as what?

A. Check received from the City Optical Company of so much. That goes with the other daily receipts and every day that is added up and shows — much I received that day.

Q. How much you received that day from all sources?

A. How much I received that day from all sources.

Q. How did you treat this trade discount allowance for tax purposes?

A. That goes into the regular receipts, received by the year.

Q. So it was included in your regular income tax?

(Tr. p. 167) A. Oh, I paid income tax on it.

Q. You know any public policy that your receipt of these trade discounts violates?

A. None whatsoever.

Q. Do you know of any ethics of the Medical Society that it violates?

A. No, none whatsoever.

Cross-examination of DR. J. D. FREEMAN.

By Mr. Maddox:

Q. Exhibit 22 as to which you have identified your signature—that was one of a number of checks you received in that year, was it not?

[fol. 29] A. Yes, I received one of these every month.

Q. You have received one of these every month for how many years?

A. Since 1922.

Q. Up to the present time?

A. Up to the present time.

Q. Do you still receive these?

A. Yes, sir.

Q. Does this amount represent approximately what you have been receiving monthly?

(Tr. p. 168) A. It varies considerably.

Q. From what to what?

A. When I first started, to be honest with you, it was around about \$40 or \$50 a month. As my practice increased the checks increased. As my patients increased the checks increased.

Q. Now, Dr. Freeman, a patient comes to you for examination of his eyes. Is that what I understand?

A. Yes.

Q. You are known as an oculist?

A. Eye, ear, nose and throat. I do all of that.

(Tr. p. 169) Q. And does anyone send the patient to you?

A. Oh, yes.

Q. Does the optical company?

A. No.

Q. And you examine the eyes?

A. Yes, sir.

Q. And you make a charge for that examination?

A. Yes.

Q. Now, in each — where you examining a patient's eyes, do you recommend the City Optical Company?

[fol. 30] A. I said they can go to the City Optical Company.

Q. I beg your pardon?

A. I tell them they can go to the City Optical Company.

Q. You don't recommend them?

A. Oh, yes, I recommend City Optical Company.

Q. What do you say to the patient?

A. I say, "You can take this to the City Optical Company," and if they don't want to take it there I say "Take it anywhere you like."

Q. Do you urge them to go?

A. Oh, no.

Q. You said you consider this as a trade discount. What am I to understand by that term "trade discount"? What is in your mind?

A. I consider it a service I render the patient. They (Tr. p. 170) come back for re-examination, off and on, and I don't make any charge. If the glasses need adjustment the City Optical Company does that free of charge. That saves me lots of time in fitting the frames and readjusting.

Q. What does the re-examination consist of?

A. Some of them I give a complete examination again.

Q. What is the reason for that?

A. They say the glasses don't fit. They don't see as good as they should.

Q. What is the fault of that? Why can't they see good?

A. Sometimes the glasses are crooked like that (indicating).

Q. You have to make a complete examination to determine that?

A. I test the lens, to see if it fits the prescription I [fol. 31] wrote, and I give a complete examination, and see that the glasses are all right.

Q. Do you always give a complete examination when they come back?

A. If it is a kid you have to put drops in the eyes. I do not do that all the time. You might call it a superficial examination, put the lens on and try those and put the old lens on and I see that the lens checks up correctly.

Q. Do you in each case make a re-examination? Is that what I am to understand?

(Tr. p. 171) A. I test them out, yes.

Q. Does that consist only of putting the glasses on the eyes and looking at them? You don't examine—you don't re-examine the eyes, do you?

A. That is re-examining the eyes.

Q. What do you do on the first examination?

A. The first examination I take the vision, then I make a manifest test, and put the lens on. Then I put the drops in the eyes, dilate the pupils and examine through a retinoscope and ophthalmoscope and fit the glasses.

Q. Anything else?

A. I fit the glasses and then my prescription.

Q. Do you do that again on your re-examination?

A. Not all of it.

Q. What do you do on re-examination?

A. If it is an elderly patient I first check the lens to see that they are what I ordered. If they are what I ordered I put the trial frame on and put the lens on exactly like I had them for the first examination. If they prove correct I say the lens only needs adjusting. It is out of line. Sometimes it takes 10 or 15 minutes, no longer than that.

[fol. 32] Q. If the patient is not elderly, what do you do?

A. If the patient is not elderly I give a complete examination.

Q. If the patient is not elderly?

(Tr. p. 172) A. I have to give a thorough examination again.

Q. What is the reason for that?

A. The mother says the kid can't see, headaches or something like that.

Q. How many of the patients are children?

A. I can't tell you that; I can't possibly tell that.

Q. Now, as a matter of fact, Dr. Freeman, most of the re-examinations consist of—in most of your examinations there is nothing wrong with the glasses at all?

A. Some. In some I make mistakes.

Q. In most you don't?

A. In some I have to change prescriptions entirely. If I change the prescription entirely I send the new prescription to the City Optical Company and I make no charge and they don't.

Q. Whose fault is it when you have to do that?

A. Some are my fault.

Q. And that is rare?

(Tr. p. 173) A. That is rather rare. We all make mistakes; I make mistakes.

Q. And in a great number of cases it is just a small mechanical adjustment that is necessary. Isn't that true?

A. That is true.

Q. And you just discover that. You don't correct it yourself, do you?

A. No, I do not. If it is in the frame I don't correct it. City Optical Company does that.

[fol. 33] Q. You just discover it and send it back?

A. Yes.

Q. These occasions, are they numerous where the frame does not fit?

A. Some people are not hard to fit.

Q. You are not answering the question. The question is: Are those occasions numerous?

A. Several a week. I don't know if it is numerous.

Q. Approximately how many patients do you have a week so we can determine if they are numerous or not? Can you state that?

A. I cannot tell you how many patients I have a week. I can look at my books and tell you.

Q. You cannot without looking at your books?

A. No, sir. I can't determine how many patients I have a day.

(Tr. p. 174) Q. You said the City Optical Company gives you one-third. One-third of what?

A. One-third of the whole collection.

Q. From whom?

A. From the patient.

Q. And how was that third determined?

A. If they collected \$100, one-third of \$100.

Q. How did you arrive at one-third?

A. We thought that that would be about right for the services they rendered.

Q. How did you arrive at one-third as the right amount you would receive of the patient's charge?

A. That has been customary. That is the only thing I know.

Q. Just a matter of custom. Was anything else back of that one-third?

A. No, sir.

[fol. 34] Q. Now, you said you have no knowledge that receiving this one-third was against public policy. Have you ever heard or read anything with reference to it?

A. As to the ethics?

Q. Have you ever read or heard anything with reference

to this practice of a third going from the optical company to the doctor who made the examination?

A. Right recently I have.

(Tr. p. 175) Q. Where did you hear that or where did you read it?

A. In the paper.

Q. Can you tell us where you were acquainted with it or where you heard it or read it?

A. I read it in the papers. Our papers have it in Wilmington and the Greensboro paper.

Q. Has it ever been brought up in the American Medical Association meetings?

A. Yes, brought up at the last meeting.

Q. How many times do you recall it being brought up?

A. One time.

Q. Just once?

A. Yes, sir.

Q. With those qualifications, then your statement that you know of no public policy or anything against medical ethics—is that the way I am to understand your statement?

A. Yes, sir.

Q. In other words, you are acquainted with a discussion of the matter through newspapers and through discussions in the American Medical Association? Is that right?

A. That is right.

[fol. 35]

Redirect examination of Dr. J. D. Freeman.

By Mr. Thigpen:

(Tr. p. 176) Q. And the newspaper accounts and the discussions in the American Medical Association, there has been no definite ruling by the Association in the matter of these trade discounts, has there?

A. No, sir.

The Court: Are there any of your patients who take your prescriptions to a company other than the City Optical Company?

The Witness: Yes, sir.

The Court: In those instances, what happens?

The Witness: I have to measure the frames and send them to where they want, and if they go to Wilmington or Greensboro or Raleigh or different places they send the glasses directly to the patient.

The Court: Is your treatment of the patient different in those cases?

The Witness: No, sir, none whatsoever.

The Court: Another question I would like to ask you. When you examine a patient and complete that examination and give him or her a prescription, you charge the patient a fee for that. Is that so?

The Witness: That is correct.

The Court: Now, when they take that prescription, you [fol. 36] recommend that they take that prescription to the City (Tr. p. 177) Optical Company to be filled?

The Witness: That is right, sir.

The Court: When they take that to the City Optical Company and it is filled, the City Optical Company pays you one-third of what the City Optical Company receives from your patient?

The Witness: That is right.

The Court: When you recommend that your patient go to the City Optical Company to have your prescription filled, do you tell, or does the patient know, that you are to receive one-third of what the patient pays the City Optical Company for that service?

The Witness: Some do and some do not. If they ask me I tell them. If they don't ask me, I don't.

The Court: About what proportion ask you?

The Witness: Very few.

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Direct examination of Dr. S. E. Koonce.

By Mr. Thigpen:

(Tr. p. 178) Q. Where do you live, Dr. Koonce?

A. Wilmington, North Carolina, 1709 Princess Street.

Q. How old are you, Doctor?

A. I was born on the 14th of May, 6 o'clock, 1870, according to my mother's Bible.

Q. What is your profession, Doctor?

A. After I graduated at Trinity College which was [fol. 37] then in Randolph County and then moved to Durham, I taught for 3 years.

Then I studied medicine and graduated in 1896.

Q. When were you admitted to the practice of medicine?

A. 1896.

Q. Was that general practice?

A. Yes.

Q. When did you specialize or limit your practice in a special field?

A. I went to the post-graduate in New York in 1907 and began practicing eye, ear, nose and throat in 1908.

Q. And you have been practicing continuously since that (Tr. p. 179) time.

A. Until last April.

Q. What happened last April?

A. Quit.

Q. Retired?

A. Yes, sir.

Q. Doctor, what professional societies have you been a member of or are you now a member of?

A. The American, the State and the local.

Q. How long did you practice as an eye doctor?

A. From 1908 to the first of April, 1948.

Q. How long have you known T. B. Lilly?

A. Ever since he has been in Wilmington. I knew his brother who practiced eye work in Fayetteville before that. He referred me a case or two.

Q. About when did Mr. Lilly come to Wilmington?

A. I couldn't answer that question unless I would take my prescription books and look at them, and I haven't got them here.

Q. That was a good many years ago!

[fol. 38] A. Yes, sir, you know that.

Q. Dr. Koonee, what arrangements, if any, did you have with the City Optical Company with regard to what we call a trade discount allowed?

A. Well, just at the end of the month there is a certain (Tr. p. 180) percent that whenever I gave a prescription—since he has been in Wilmington—because it was much quicker and he was the only manufacturing optician there,

the only man that did surface work—the ordinary opticians couldn't surface the glass and he is the only man who could do surfacing work.

The first firm I ever dealt with was F. A. Hardy in New York, the second I believe was D. V. Brown in Philadelphia, and I got it quicker, and then, I used S. Gillespie in Richmond and Norfolk and a firm in Columbia, South Carolina.

Q. When you sent those prescriptions off and they manufactured the glasses, what did they charge you for the glasses?

A. They had a prescribed price and we had that price list.

Q. Was that prescribed price that you actually paid to the manufacturer, the same as the price that you charged the patient retail for those glasses?

A. No, that has never been the custom.

Q. There was a difference?

A. There was a difference, yes.

Q. Dr. Koonce, I wear glasses. Suppose I came to you and had you examine my eyes. Explain to His Honor just what would take place with regard to the prescription?

A. Well, on account of the City Optical Company being in Wilmington, the majority asked me "Where shall I [fol. 39] take this (Tr. p. 181) prescription," and I tell them to the Optical Company. Some will tell me "I am going to Raleigh. Can't I take the prescription there," and I tell them "Yes," and I have had one or two tell me they were going to Richmond or Norfolk and take the prescription there if they want.

Q. So if the patient gets your prescription and takes it to the City Optical Company, and the City Optical Company manufactures the glasses, then what takes place?

A. The City Optical Company collects the prescription price of the glasses just like the other people had a prescription price.

Q. Then after the City Optical Company collects the prescription price, did you ever receive any portion of it?

A. Yes, at the end of every month.

Q. What did you receive, what portion?

A. About one-third, I think.

Q. What has been your experience in dealing with the City Optical Company?

A. Why the owner of that is one of the finest men and the fairest men, gives the fairest treatment to both the physician and the patient, that I ever had any dealings with. If there was any correction I always instructed my patients, and I think that was customary and would account for any fund that we received—my advice would be come back and let me check that prescription and see that it was right.

(Tr. p. 182) Q. When you received these remittances from City Optical Company each month, based on your memorandum, what did you do with the remittance?

A. Deposited it.

Q. And treated it on your books and records as what? [fol. 40] A. A private account.

Q. What do you mean by "a private account"?

A. Deposits in the bank.

Q. Deposits in the bank. Was that deposit included in your income?

A. Yes, sir.

Q. Treated just like any other money you received?

A. Yes, just like a cataract extraction or a mastoid operation.

Q. Did you ever receive any trade discounts from any other firms than City Optical Company?

A. There was a prescription price and a wholesale price, just like these people have, no different.

Q. Doctor, do you know of any public policy that the receipt of these trade discounts by you violated?

A. No, sir.

Q. Do you know of any professional ethics in the medical profession that were violated by your receipt of these trade discounts?

A. I didn't consider it so.

(Tr. p. 183) Q. Do you know of any announced ethics by the Medical Society?

A. Those things have been discussed by the Medical Association.

Q. But to your knowledge has there ever been any prohibition against the receipt of these?

A. No, sir.

Cross-examination of Dr. S. E. Koonee.

By Mr. Maddox:

Q: Dr. Koonee, I understand from you when you say "prescription price," you mean the price that the patient pays for the completed glasses. Is that what I understand?

[fol. 41] A. Well, since the manufacturing optician has been in Wilmington, I didn't collect it, but when the prescription had to be returned to me from New York or Baltimore or Richmond or Columbia or Norfolk, I had to collect it then and I collected it from the patient, what was considered a normal prescription price.

Q. How was that ascertained?

A. In Wilmington I have never collected it. The City Optical Company collected it.

Q. Prior to your arrangement with City Optical Company, how did you determine the prescription price that you charged for the glasses?

(Tr. p. 184) A. I didn't determine it. He had a catalogue price and he used the same price. I had a catalogue price on what it was and it was in accord with that. So much for the compound lens, so much for the simple hyperopia or myopia, according to the strength of the lens.

Q. They were listed in a catalogue?

A. We had price lists. You could call it a catalogue or whatever you want to.

Q. You had a catalogue yourself?

A. I had for all those other companies and others we estimated.

Q. When you say "all those other companies"?

A. I don't know if I ever had one of them or not.

Q. By "them", meaning City Optical Company?

A. I think I had one. I am not sure. I would have to ask Mr. Lilly about that.

Q. What do you mean by the "other companies"?

A. F. A. Hardy, D. V. Brown of Philadelphia.

Q. Those you enumerated in your direct examination?

A. I had to order them in 1908, as I stated, because there [fol. 42] was no manufacturing optician close to us, there was none in the State. The closest was Richmond and Norfolk.

Q. For the examination of the patient's eyes you collected a fee?

A. Yes, sir, a fee for the examination and the other part (Tr. p. 185) that we got I always considered paid for the checking and examination of the glasses and then whenever the glasses came the City Optical Company—if the patient brought it to another place that firm always sent about the same discount that the City Optical Company or I would get at the end of the month. When there wasn't any firm in Wilmington I would collect it and send it to the companies at the end of the month.

Q. Were there ever any optical companies in Wilmington aside from the City Optical Company?

A. Never before—never been a manufacturing company except the City Optical Company in Wilmington. Nobody ever had a surfacing machine. One or two men there did edging, but a compound prescription they can't edge. They can't keep a stock.

If you have a compound lens that would mean they couldn't do that and they would have to send it to the City Optical Company or down to some distant firm to have these lenses surfaced.

Most of them did have an edging machine but, for instance, if you had a plus one or a minus one lens they have a machine that would edge it to fit a certain size frame.

Q. Getting back to the prescription price, that is the amount that the patient pays for the finished glasses, isn't it, Dr. Keoncse?

A. It is what the patient paid, yes, sir. It has always [fol. 43] (Tr. p. 186) been about the same for all optical companies.

Q. And the third that you got of that prescription price—

A. Excuse me just a minute. The practicing opticians who are not doctors or optometrists—there is no rule but they usually added a fee into the prescription price. That is my understanding. I couldn't swear to that but that is what I have always heard.

Q. The third you got was one-third of the prescription price, wasn't it?

A. I think so. For the last few years at any rate that

is so. I didn't estimate it. I would look over the names of the patients and that would be about all.

Q. Now, this amount that you received each month or have received each month, representing one-third of the prescription price paid by patients that went to optical companies, is what you have termed "trade discounts"?

A. Yes, or service discounts, whichever you want to call it. There is an exception to that.

Q. When the patient got the glasses in each case did they return to you after getting the glasses?

(Tr. p. 187) A. That was my advice.

Q. What did you do after they returned?

A. I check the center of the glasses and the fitting of the frames, to see if they were comfortable and had a proper pupillary distance.

Q. Was that all you did?

A. With the exception of charitable cases. I never received a fee and the City Optical Company always had a [fol. 44] very small fee cost for the glasses, less than their own fee. We had to get a permit from the Board of Charities and they would order it and I never charged anything and they charged a very small amount for the glasses—not over the cost to them of the actual material.

Q. You mean a very small cost to the patient?

A. A very small cost to the patient, none to the doctor. A very small cost for the glasses and that was not included in our monthly statement—nothing but private or pay patients.

Q. And some fee came from the State. Did the State pay any part of the cost of the charity patients?

A. The Board of Health paid for the glasses of charity patients.

Q. You made a statement that you know of no public policy which contravenes this practice. Have you read anything about public policy on the subject?

A. I have read a lot of Articles about that but nothing (Tr. p. 188) I could say is definite.

Q. Have you ever heard discussions on the subject?

A. I have heard of discussions.

Direct examination of Dr. Paul Black.

By Mr. Thigpen:

Q. Dr. Black, give us your address?

A. 218 North Fifth, Wilmington.

Q. How old are you?

A. I am 42.

Q. What profession are you engaged in?

A. The practice of eye, ear, nose and throat.

Q. Will you outline briefly to His Honor your medical (Tr. p. 189) training.

[fol. 45]. A. I finished medical school in 1933 which was end of my internship. From there I went to Long Island Hospital, Boston, Massachusetts for a year and a half. Then I spent a year at the Hinsdale Sanitorium and Hospital in the suburbs of Chicago in eye, ear, nose and throat, and also Chicago Eye and Ear Infirmary, and then Battle Creek Hospital, and was head of the Eye, Ear, Nose and Throat Division for a year and a half.

Q. What college did you attend?

A. College of Medical Evangelists in Louisiana.

Q. When were you admitted to the practice of medicine?

A. 1933, when I finished my internship. I took the State Board of Maine.

Q. When did you come to North Carolina?

A. The first time I came was in 1937.

Q. When you came to North Carolina in 1937 where did you locate?

A. Wilmington, North Carolina.

Q. Were you engaged in general practice?

A. For a short time, about two and a half years.

Q. Then what did you do?

A. I went in the Army at the end of 1940.

Q. At the end of 1940 you went into the Army?

A. That is right.

(Tr. p. 190). Q. Did you do any specialized practice before you went into the Army?

A. I did.

Q. What was that?

A. Eye, ear, nose and throat.

Q. How long were you in the Army?

A. Five and a third years.

Q. After you got out of the Army, what did you do?

[fol. 46] A. I went into eye, ear, nose and throat.

Q. Where?

A. Wilmington; North Carolina.

Q. And you have practiced eye, ear, nose and throat work continuously since?

A. Yes, sir.

Q. How long have you known Thomas B. Lilly.

A. I believe 1938.

Q. What business is he engaged in?

A. In the manufacture of optical supplies, glasses.

Q. Do you know the name of the company?

A. City Optical in Wilmington.

Q. Dr. Black, one of the issues in this case has to deal with what we have termed trade discounts allowed. Do you know anything about trade discounts allowed to doctors.

A. Yes, sir.

Q. Did you ever receive any trade discounts?

(Tr. p. 191) A. Yes, sir.

Q. Will you explain to His Honor briefly your understanding of this trade discount allowance?

A. Sir, that is money that is returned by the optical company or wherever the purchase of glasses is from for services rendered the patient during that period of time for the fitting and checking of that patient.

Q. Suppose you give us an illustration. I wear glasses. Suppose I came to you and asked you to examine my eyes and you gave me a prescription and I had it filled and paid for the glasses, and so on. Take a hypothetical case and tell His Honor what would happen in the matter of payment for those glasses and what would you receive as a trade discount?

A. The patient is given a prescription. They are not [fol. 47]. directed to go to any individual. Of course in Wilmington only one company makes glasses and that individual necessarily has to buy their glasses from somebody that gets their glasses from the City Optical.

They can take it to any individual they want to have the prescription filled. There is only one place that makes glasses in that community.

Q. As an illustration, if I took the prescription to the

City Optical Company and they filled the prescription, what would they do?

A. Of course, they fit the patient and the patient pays (Tr. p. 192) them. At the end of the month the number of patients you have—the doctor receives one-third of the total charge.

Q. Of the total charge to the patient?

A. The total the patient pays.

Q. Suppose I went in and got my pair of glasses and walked out and didn't pay the City Optical Company?

A. There would not be any money received by either the City Optical Company or by the doctor.

Q. By either City Optical or by you. Is that right?

A. Yes, sir.

Q. What has been your experience with the City Optical Company, Dr. Black, in this connection?

A. I have dispensed glasses and I, of course, have dealt with the City Optical Company. I have dispensed glasses with other firms and that means the purchase of the glasses at wholesale price and sold them at retail price. I think that the patient gets much better service when they can go to a place where trained personnel can look after the prescription, fit and adjust, and look after that individual, than if they came to me.

[fol. 48] Q. And this arrangement with the City Optical Company has been very satisfactory, has it?

A. Highly satisfactory, better than any group that I knew of as far as service to the patient.

Q. Dr. Black, do you know of any law or public policy (Tr. p. 193) that the receipt by you of such a trade discount violates?

A. I do not, no, sir.

Q. Do you know of any provision of the Medical Code of Ethics that the receipt of such trade discount violates?

A. No, sir.

Cross-examination of Dr. Paul Black.

By Mr. Maddox.

Q. Now, Dr. Black, for examining the patient's eyes you charge a fee, do you not?

A. Yes, sir.

Q. What is that fee for?

A. For fitting the patient with glasses.

Q. I am speaking about the fee you charge the patient.

A. That is for examining and fitting the patient—examining the patient's eyes and fitting him with glasses.

Q. Now, how does it happen that you get a third of what Mr. Lilly charges your patient for the glasses he has made for the patient? How does that happen to be a third?

A. I think probably that is taken as the amount that it probably costs to carry the patient over the period of time, as far as the glasses are concerned.

Q. I don't understand that statement.

[fol. 49] A. Allow me to explain. The patient is examined and given a prescription. He takes it to the City Optical.

(Tr. p. 194) The City Optical fits that individual with frames and makes the glasses. The patient goes back and gets the glasses and they are adjusted on the patient's face.

Now, they come back as a rule—they don't all come back—but as a rule they come back to the doctor and the doctor re-examines them and sees that the glasses are all right and that their vision is all right with the glasses and that everything is satisfactory. If they are not pleased with the glasses and they are not correct, we have an understanding that we will re-examine them and give them a new prescription as many times as is necessary.

Of course, doctors make mistakes, as everyone else does. If we should make a mistake we give the patient another prescription and he gets the new lenses at no cost to him. That takes time from the doctor.

The patient comes back in a month or two weeks or three weeks, and says, "Doc, these glasses don't fit," and you see that the glasses are out of adjustment, something is wrong with them, and you send it back to City Optical and they correct that.

They give that service but the doctor has to take up his time to check on that. There is no charge made by the doctor to check and see them.

Q. When the patient comes back to you what do you do?

A. Re-examine him.

(Tr. p. 195) Q. That is a general term. I want specifically just what you do.

A. Sometimes it includes a complete eye examination and [fol. 50] sometimes it is not a complete examination.

Q. In what instances does it entail a complete examination?

A. In what instances?

Q. Yes.

A. Sir, if the patient complained that the sidewalk appeared crooked to him, or if they said their vision in one eye was blurred and they couldn't see out of that lens, and you gave him a superficial examination and still it appeared you had to re-examine him you might put drops in the eyes again and give him another examination.

Q: Is that a case where the doctor made a mistake? Is that what I understand?

A. Sometimes that is true.

Q. How often do you have to make a complete re-examination?

A. Sometimes it comes kind of often.

Q. I beg your pardon?

A. Sometimes it comes kind of often; sometimes we don't have to do but once a month, and maybe it will be five or six months, and maybe there won't be any during the month. It is hard for me to tell how many times.

(Tr. p. 196) Q. You haven't any idea?

A. The percentage I wouldn't say. I could guess but I might be wrong.

Q. You have been practicing how many years?

A. Since 1933, but I have never added up the number.

Q. Are there many compared with the total number of patients you have treated?

A. I think that number varies according to how many patients you have to take care of. I think if you examined [fol. 51] a great many your errors would be more.

Q. Over the period of time you have been practicing would you say it has been many or few.

A. I think that is few. I think that is because I try to exercise a good deal of care.

Q. And most of the patients come back and the glasses are correct, aren't they?

A. Yes, sir, they are. I would like to say this, if it is all right: In some individuals you can make four or five pairs before you find a pair that will satisfy them.

Q. How many individuals have you done that for?

A. Since I got out of the Army I expect I have had at least 30 and maybe 50.

Q. What is the reason for it?

A. Well, various reasons.

Q. Let's have some of them, the main ones.

(Tr. p. 197) A. There can be muscular unbalances, differences of prescriptions of one lens over another. For instance, a patient who is nearsighted in one eye and farsighted in the other eye—it is difficult to balance their eyes and sometimes I think it is due to the individual being a nervous type of individual, and I have some people who when they walked in you knew you had to make two or three pairs of glasses for them.

Q. You mean their eyes changed from day to day?

A. With some individuals it is change and with some it is the individual himself, and some are not satisfied until they have had three or four pairs made.

Q. That is quite general in the practice?

A. I think every doctor has that.

Q. I mean in your practice.

A. It is not the usual thing, no, sir.

Q. You say you have had 30 or 40 in your experience?

[fol. 52] A. I think I have had that many since I came out of the Army.

Q. Since 1933?

A. Since 1945.

Q. You specialized in eye, ear, nose and throat in 1937 before you went in the Army?

A. And I did it while I was in the Army, and I might add during the time I was in the Army I was Chief of the Eye, Ear, Nose and Throat Sections in a 2700-bed hospital and we fitted (Tr. p. 198) twenty-to-thirty-thousand pairs of glasses.

Q. Did you have the same experience in the Army?

A. It is not as bad in civilian life as it is in the Army.

Q. How many did you have in the Army?

A. It was according to the morale of the particular regiment or group.

Q. I am not asking the cause. I am asking the number.

A. I think it was higher in the Army, perhaps ten or fifteen percent higher.

Q. And you can't give it in numbers. You could just give it in percentages?

A. I couldn't give it in numbers.

Q. How many patients did you have while you were in private practice. You estimated what you had in the Army.

A. I had exact records in the Army because we had to give reports.

Q. Don't you make exact records?

A. Yes, sir.

Q. Don't you have any recollection as to the number of patients?

A. I think I could figure it up.

[fol. 53] Q. It means nothing unless you give some additional facts.

A. I expect I see between 200 to 300 patients a month. (Tr. p. 199) That is not all eye work, however, not all glasses, not all refractions and fitting of glasses.

Q. How many were for glasses?

A. I think 25 percent of that number.

Q. Now a goodly number of the patients never return to you for re-examination, do they?

A. Still on a percentage basis I would say that between 50 and 60 percent do not return.

Q. And in those cases do you still get the third of the price charged that patient?

A. Yes, sir.

Q. When you talked about trade discounts you meant the third of the purchase price the patient paid for glasses that were remitted to you at the end of each month?

A. Yes, sir, that is right.

Q. Now, you say you know of no public policy against the practice.

A. I know of no law or public policy, no sir.

Q. Have you ever read any articles discussing the question, the general question?

A. Yes, sir.

Q. Have you ever heard discussions of the general question about these payments of one-third of the patient's charge for the glasses to the doctor?

A. May I ask what you mean by "discussion"?

(Tr. p. 200) Q. "Discussions" is a very broad term.

You might have discussed with me or anybody — any discussion.

A. Certainly we have discussed it among ourselves.

Q. What do you mean by that?

[fol. 54] A. The eye, ear, nose and throat practitioners.

Q. When was that discussed?

A. We had a meeting some time back.

Q. Is that a branch of the American Medical Association?

A. We are members of the Medical Association. That was not any branch of it. That was the individuals meeting together.

Q. Was it the organization?

A. Just as a group.

Q. Just oculists or eye doctors who got together informally and discussed it?

A. That is right.

Q. Have you ever heard it discussed in an American Medical Association meeting?

A. No, sir, I have not.

Q. Have you ever heard it discussed at State Medical Association meetings?

A. I heard it discussed at the State Eye, Ear, Nose and Throat meeting.

Q. Have you ever heard it discussed in your local meetings of the American Medical Association?

(Tr. p. 201) A. I have never heard it discussed. It was brought up once and one individual talked about it for a few minutes.

Redirect examination of Dr. Paul Black.

By Mr. Thigpen:

Q. What professional societies are you a member of, Dr. Black?

A. The Eye, Ear, Nose and Throat Society of North Carolina.

[fol. 55] Q. Are you a member of the American Medical Society.

A. Yes, sir, and State and county Medical societies.

Q. Has any action ever been taken by any medical society condemning the receipt of trade discounts that you have received?

A. Not that I know of.

The Court: Doctor, of those patients of yours to whom you give prescriptions under the contract you mentioned, are there any of them who take their prescriptions to other than the petitioners in this case?

The Witness: Yes, sir.

The Court: In those instances is there any re—any difference in the treatment to you, that you accord such patients or the contracts that you make with them?

The Witness: No, sir.

(Tr. p. 202) The Court: When you examine a patient's eyes and give him a prescription you charge him a fee. Is that true?

The Witness: Yes.

The Court: And the patient pays you?

The Witness: Yes, some of them do.

The Court: I wish all of them did. Then you give him a prescription and they take that to a particular place to have filled. Is that true?

The Witness: To some I recommend it.

The Court: When you make that recommendation or when they do take it, do you tell them, or do they know that [fol. 56] they are paying one-third of the amount they pay that company in fact to you?

The Witness: Some do; most of them don't.

Recross-examination of Dr. Paul Black.

By Mr. Maddox:

Q. The doctors that are here with you—are they members of this same Association?

A. Yes, sir.

Q. Have they discussed this general proposition among themselves?

A. All I can speak about is for those in Wilmington. We have discussed it.

Q. The Wilmington group?

(Tr. p. 203) A. Yes, sir.

Direct examination of Dr. David B. Sloan.

By Mr. Thigpen:

Q. What is your address, Doctor?

A. Wilmington, North Carolina.

Q. How old are you?

A. I was born September 18, 1889.

Q. That makes you about what?

A. Fifty-nine.

Q. What profession are you engaged in?

A. I am doing eye, ear, nose and throat work in Wilmington, North Carolina.

Q. Tell His Honor briefly your education and medical—

A. I graduated from the Academic Department, University [fol. 57] of (Tr. p. 204) North Carolina, and then the University of Pennsylvania Medical School.

Q. When.

A. 1914. I graduated in 1910 from the University of North Carolina.

Q. When were you admitted to the practice of medicine?

A. 1914, sir.

Q. Was that the general practice of medicine?

A. Yes.

Q. When did you start specializing?

A. I went to work in Wilmington doing the work I am doing now on March 9, 1920.

Q. What is that work that you now do?

A. I am doing eye, ear, nose and throat work.

Q. Do [So] you have been an eye doctor since about 1922, did you say?

A. 1920, sir.

Q. 1920?

A. Yes, sir.

Q. What professional societies are you a member of?

A. I am a member of the County Medical Society, the State Medical Society, the North Carolina Eye, Ear, Nose and Throat Society, the Southern Medical Society and American Medical Association.

Q. How long have you known Mr. Thomas B. Lilly?

(Tr. p. 205) A. I cannot answer that question definitely but approximately 25 years I would say.

Q. What business is he engaged in?

A. He is a manufacturing optician.

Q. What is the name of that business?

A. City Optical Company.

Q. Dr. Sloan, in this proceeding we have a question with [fol. 58] regard to what is termed "trade discounts al-

lowed." Explain to His Honor, if you will, what you know of the trade discounts allowed by the City Optical Company.

A. The trade discounts allowed by City Optical Company to us amounts to 33½ per cent of the profit [price] he takes in over there on our prescriptions.

Q. Of the amount the City Optical Company takes in on a prescription that you write?

A. Yes, sir.

Q. What is that arrangement? Why is that made?

A. We feel like it is done for the professional services rendered the patient.

Q. I wear glasses, Dr. Sloan. Suppose I came to you as a patient and you wrote a prescription for my glasses. Will you outline briefly what I might do with prescription and then what I pay for my glasses; and what you get back or what you get from that amount?

A. I give you the prescription which you take to get (Tr. p. 206) filled wherever you choose to get it filled, and when filled by Mr. Lilly or any outside concern a third of the profit that comes from that prescription is refunded to me.

Q. Is any memorandum from the sales to your patients submitted to you from time to time?

A. A monthly statement is rendered.

Q. Dr. Sloan, what does that list that is submitted to you each month show?

Mr. Maddox: I suggest, Your Honor, the list would be the best evidence of what the list shows.

Mr. Thigpen: The only purpose, may it please Your Honor, is to clarify a little mix-up in his testimony as to profit as against the amount paid. I submit we could have [fol. 59] brought in a lot of lists and could have been here a week proving every transaction, but I am merely trying to bring out from this witness the custom of the trade and this arrangement.

The Court: If it is directed to the custom of the trade we will overrule the objection and note an exception.

By Mr. Thigpen:

Q. Answer the question, Doctor.

A. The list submitted each month is the list of the patients

chronologically as we see them, and as they go to City Optical Company, with the patient's name and the amount paid for the glasses, and—

(Tr. p. 207) Q. Stop right there.

The Court: I would like you to finish. You said "and." Did you mean "and stating the $\frac{1}{3}$ that was payable" to you?

The Witness: Yes, sir.

By Mr. Thigpen:

Q. Dr. Sloan, is this trade discount allowance generally a custom of the profession?

A. To my knowledge, yes, sir.

Q. Did you receive such trade discounts from other manufacturing optical companies?

A. Yes, sir.

Q. When you received these trade allowances how did you consider them and how did you treat them?

A. As money received for services rendered, deposited [fol. 60] in the bank and accounted for with all reports made to the Government.

Q. Did you include it in your income as professional receipts?

A. I think so. I am not sure about that particular point.

Q. What has been your experience with the City Optical Company over the years as to the quality of their work and service to patients?

A. It has been excellent.

Q. Dr. Sloan, do you know of any public policy or law, (Tr. p. 208) Federal or state, that the receipt by you of these trade discounts would violate or does violate?

A. I do not, sir.

Q. Do you know of any professional code of ethics or any provision of the ethics of the medical association that the receipt of these trade discounts would violate or does violate?

A. I do not, sir.

Cross-examination of Dr. David B. Sloan.

By Mr. Maddox:

Q. Now, Dr. Sloan, will you briefly state why you consider the third of the amount charged your patients by the City Optical Company for glasses they have made up on your prescriptions, are trade discounts? What do you mean by that?

A. Sir?

Q. What do you mean denominating that third that you get from City Optical Company, which they collect from your patients for the glasses they make for your patients—why do you consider that a trade discount?

[fol. 61] A. We consider that due us because of services rendered to the patient. He comes back and gets his glasses checked and rechecked.

We request all of them to do that. If for any reason we made an error in the prescription we correct that, as we do (Tr. p. 209) frequently, for which we make no charge, and Mr. Lilly gives them for which he makes no charge.

Q. When you first examine the patient do you charge him a professional fee?

A. Yes, sir.

Q. Do I understand then that the third that you get from City Optical Company, that is an amount representing one-third of that which the City Optical Company charges your patient for the finished glasses—do I understand that is insurance against your mistakes? Is that as I understand?

A. No, it is not. It is given to us for the welfare of the patient.

We request them to come back and if anything is wrong we adjust the glasses and correct them and we think that amount of money is due us for this particular service rendered to the patient.

Q. The third due you for what you do after the patient gets the glasses. Is that correct?

A. For the whole procedure.

Q. Suppose the patient doesn't come back?

A. Well, we request him to and we are there to serve him if he does come back.

Q. Now, your examination of the patient when he first comes to you is quite an extended examination, isn't it?

A. Sometimes it is, sir.

[fol. 62] (Tr. p. 210) Q. Isn't it always?

A. As a rule it is, yes, sir.

Q. Does it consume a considerable time?

A. Yes, sir.

Q. Requiring quite a few examinations from different points of view?

A. Yes, sir, that is right.

Q. Now, this reexamination that you talked about when the patient comes back with the finished glasses, what does that amount to?

A. The patient is brought in and checked.

Q. How is he checked?

A. I neutralize the glasses with the prescription given him.

Q. You take the glasses given the patient and compare them with the test lenses you have?

A. With the lenses I have and the prescription as written; and then I see what he sees with the glasses, if his vision is satisfactory. If not we try to find out why it is not.

Q. And that consumes not a great deal of time, does it?

A. No.

Q. Now, have you read anything with reference to the practice of optical companies paying doctors a third or a percentage of the price charged patients for finished glasses?

(Tr. p. 211) A. I have, sir.

Q. Have you heard discussion on the subject?

A. Yes, sir.

Q. Have you heard it discussed in your medical meetings?

A. Personally I have not, sir.

[fol. 63] Q. Do you attend those meetings?

A. As a rule, sir. I was not attending the one last year, however.

Q. Have you heard what was discussed?

A. I have, sir.

Q. Have you read it in any medical journals?

A. Yes, sir.

Q. I beg your pardon?

A. I have read articles—not what was discussed at our particular meeting but I have read discussions on the subject in the medical journal.

Q. In the medical journals?

A. Yes, sir.

Direct examination of Dr. George C. Allen.

By Mr. Thigpen:

(Tr. p. 213) Q. Where do you live?

A. In Lumberton.

Q. Lumberton, North Carolina.

A. Lumberton, North Carolina, yes.

Q. What is your age?

A. 42.

Q. What profession are you engaged in?

A. Physician, eye, ear, nose and throat.

Q. Outline briefly for His Honor your medical training and experience.

A. My academic work was at the University of North Carolina, A. B. degree in 1928, 2 years of medicine at the University of North Carolina, M. D. degree from the University of Chicago, in 1932.

[fol. 64] (Tr. p. 214) Q. When were you admitted to the practice of medicine?

A. 1933.

Q. Was that the general practice of medicine?

A. Yes, sir.

Q. When did you specialize or limit your practice?

A. 1941.

Q. What specialty did you engage in?

A. Eye, ear, nose and throat.

Q. What professional societies are you a member of?

A. I am a member of Robeson County Medical Society, the North Carolina State Medical Society, American Medical Association, North Carolina Eye, Ear, Nose and Throat Society and the Pan-American Society of Ophthalmology.

Q. How long have you known Thomas B. Lilly.

A. Since 1941.

Q. Tell us briefly about your first contact with Mr. Lilly.

A. My first contact with Mr. Lilly was at Wilmington at the City Optical Company, making arrangements to obtain my optical supplies from him.

Q. And that was about the time you started the specialty of being an eye doctor at Lumberton?

A. That was at the time I began that.

Q. How long have you known Helen W. Lilly?

A. I have known her since the same time, the last of (Tr. p. 215) 1941.

Q. What business are Mr. Lilly and Mrs. Lilly engaged in?

A. The optical business, opticians.

Q. Do you know the name of the firm?

A. Yes, sir.

[fol. 65] Q. What is it?

A. City Optical Company.

Q. Dr. Allen, one of the questions involved in this case has to do with what has been termed trade discounts allowed to doctors by the City Optical Company. Tell His Honor what you know about trade discounts and how they were worked out.

A. Trade discounts were paid to ophthalmologists much longer than I knew anything about it because I came in later but

Q. Just limit it to what you know from your own experience.

A. I have received trade discounts from City Optical Company. Is that what you want?

Q. What do those trade discounts represent?

A. You mean in amount?

Q. That they pay to you. What do they represent?

A. They represent $\frac{1}{3}$ rd of the retail price of the glasses.

(Tr. p. 216) Q. Dr. Allen, suppose I came to you as a patient and you examined my eyes. Just outline to the Court briefly what you would do with respect to prescribing and suggesting that I have my glasses made.

A. When I examine a patient's eyes for glasses I determine the prescription I am going to give him and write the prescription and give it to him.

Q. Then what does the patient do with the prescription?

A. The patient takes it to some optical company.

Q. And the optical company does what with that prescription?

[fol. 66] A. They grind their lenses and mount them in frames and deliver those glasses to the patient.

Q. Who pays the optical company?

A. The patient.

Q. Then does the City Optical Company or any optical company that fills a prescription for a patient, give you a memorandum of those transactions?

A. Yes, sir.

Q. And do they remit to you any portion of what the patient paid?

A. Yes, sir.

Q. What portion?

A. 33 and 1/3 percent.

Q. What do you know about this practice? Is it a (Tr. p. 217) general custom?

A. So far as I have been able to find out it is.

Q. How did you consider these trade discounts that you received?

A. I considered that as a part of our fee to help take care of replacements, adjustments, re-examinations and so forth.

Q. What did you do with these trade discounts that you received? Did you report them in your income tax return?

A. Yes, sir.

Q. Do you know any public policy or any Federal or state law that the receipt by you of such trade discounts violated?

A. No, sir.

Q. Do you know of any canon of ethics of the Medical Society that the receipt of such trade discounts violates?

A. No, sir, not officially.

[fol. 67] Q. Do you know unofficially of any canon of ethics that is violated?

A. There have been some rumors and a meeting of the North Carolina Eye, Ear, Nose and Throat Society, I believe, last year, while not making it—

Q. Did you attend that meeting?

A. No, sir.

Cross-examination of Dr. George C. Allen.

By Mr. Maddox:

(Tr. p. 219) Q. Doctor, what was your first contact with Thomas B. Lilly in 1941?

A. It was arranging to obtain my optical supplies from him.

Q. Did you seek him?

A. Yes, sir.

Q. What optical supplies did you need?

A. I was dispensing glasses at the time. I needed all of my lenses, frames, some equipment for examining patients.

Q. What was the first occasion for meeting Helen W. Lilly in 1941?

A. That occasion was that she happened to be in the City Optical Company in Wilmington when I was in there.

(Tr. p. 220) Q. Now, your understanding of trade discounts allowed is that you are to receive 1/3rd of the retail price of glasses collected by the City Optical Company [fol. 68] from your patients that go to the City Optical Company. Is that your understanding of that term?

A. That was a verbal understanding, yes, sir.

Q. Now, when you examine the patient's eyes do you charge him a fee?

A. Yes, sir.

Q. And do you tell him to go to City Optical Company?

A. In our town that is the only place they have. If (Tr. p. 221) they should desire—many of them ask if they can go to another place, another town, and the prescription is theirs and they can take it any place they choose.

Q. You mean the Lumberton branch?

A. The Lumberton branch, yes, sir. If they are filled there they have to go there.

Q. Do you go to that branch often?

A. Yes, sir.

Q. How often?

A. I suppose I am in there probably 3 or 4 times a week.

Q. Are those social calls or business calls?

A. Usually business.

Q. What is that, getting glasses?

A. Usually it is to take a pair to [of] glasses somebody has mailed in to me down for replacing lenses or repairing some broken part or, occasionally, some adjustment that needs to be made.

Q. Isn't it necessary for the person to go there for those adjustments?

A. Out-of-town patients many times mail their glasses in and want them mailed back out to them after they are repaired.

[fol. 69] Q. Now, you say that the payment of 1/3rd of the retail price of the glasses paid by the patient is the general cus- (Tr. p. 222) tom. Just what do you mean by that?

A. By that I mean that it has been done much longer than my experience in the practice of ophthalmology.

Q. Does it mean that all optical companies pay ophthalmologists 1/3rd of the retail price of glasses furnished patients?

A. No, sir.

Q. Then what does it mean in that sense?

A. Our arrangement is probably more for convenience. The optical company is acting as our agent, whereas we could dispense the glasses ourselves and charge a retail price for the glasses and receive our glasses from the optical company on a wholesale basis.

That is done to save us the trouble of measuring frames, adjusting frames and fitting them on the patient.

It is considered that we receive that trade discount rather than dispense the glasses ourselves and pay the optical company the wholesale fee.

Q. Where did you get the understanding that the optical company was your agent?

A. That has been my general impression about the way that was handled since it first began being done, and in my case it was in 1946.

Before that time, I had a wholesale account, all my glasses were made by the City Optical Company in Wilmington (Tr. p. 223) and I adjusted and fitted them on the patient and made the usual retail charge for the glasses.

Q. Was this agency viewpoint the matter that was discussed in the medical meeting or among the eye, ear, nose and throat doctors?

[fol. 70] A. I was not—

Mr. Thigpen: I object to that, Your Honor. He stated that he was not at the medical meeting.

By Mr. Maddox.

Q. Has it been discussed informally among eye, ear, nose and throat doctors?

A. Yes, sir.

Q. The nature of the relationship between the doctor and the optical company?

A. Yes, sir, it has been discussed informally many times in that light.

Q. I believe you said that when you made the examination you charged the patient a fee.

A. That is right.

Q. Do you tell the patient when you give him a prescription that you expect to get a third of what he pays for the finished glasses?

A. No, sir. If they ask me I will tell them.

Q. Do they ever ask?

A. I don't know of but 2 or 3 instances where they (Tr. p. 224) ever have.

Q. In your experience?

A. Yes, sir.

Q. And when they asked did you tell them?

A. Yes, sir.

Q. What was their reply or did they make a reply?

A. I don't believe they had any reply to it.

Q. No reply? What was their attitude then?

A. I don't recall anyone making any remark about it.

Q. Did they ask any further questions?

A. No, sir.

[fol. 71] Q. You don't recall of any. Now, you say the 1/3rd of the price the patient pays the optical company for the finished glasses is to help take care of replacements, adjustments and re-examinations.

Is that what I understand you to say?

A. Yes, sir.

Q. What do you mean by "replacements"?

A. In case you have—and you have a certain number—a case where the lenses will not be tolerated by a patient or

they may have been incorrectly ground or they may be incorrectly fitted. In those cases the patients are re-examined, new lenses, if necessary, are furnished at no charge to a patient; a patient might lie down and go to sleep with his glasses on and get them bent and have to come in to get the (Tr. p. 225) frames straightened and adjusted to the face, and things of that kind, over a period of maybe 2 years after the original examination, and that is done at no charge to the patient.

Q. Do you give him an entire re-examination *at* his eyes after 2 years?

A. Not an entire re-examination of the eyes. Any adjustment—

Q. Of the frames?

A. Of the frames, yes, sir.

Q. Now, comparatively few come back, do they?

A. Not very many. Probably I would say not more than 1 in 20.

(Tr. p. 227) Q. Now, you stated that you got a monthly statement, a monthly memorandum of your patients for whom City Optical Company had made glasses.

A. Yes, sir.

[fol. 72] Q. Do you still receive those memos?

A. No, sir.

Q. When did they stop?

(Tr. p. 228) The Witness: February, 1946.

Mr. Thigpen: May it please the Court, I move to strike the answer. It is not pertinent to the taxable year 1943 and 1944. All this witness was brought here for was to testify to a trade custom of these discounts and allowances that were actually handled, paid and accrued in the taxable years under consideration. The fact that they stopped makes no difference.

The Court: We understand that only 2 years are involved here but we are not willing to say that what happened in reference to these memoranda would not be relevant in reference to the question being discussed here. Overruled; exception.

By Mr. Maddox:

Q. Now, doctor, have you ever read anything on the public policy of the practice of optical companies paying 1/3rd of the retail price of glasses charged the patients to the examining doctor?

A. No, sir, I don't believe I have read anything.

Q. And never heard any discussions?

A. Oh, yes, I have heard it discussed.

[fol. 73] Direct examination of Dr. Lcuten R. Hedgpath.

By Mr. Thigpen:

(Tr. p. 229) Q. Where do you live, Mr. Hedgpath?

A. Lumberton.

Q. Lumberton, North Carolina?

A. Yes.

Q. What is your age?

A. 40.

Q. What profession are you engaged in?

A. The practice of eye, ear, nose and throat.

Q. Outline briefly for His Honor your medical training.

A. I finished the University of Maryland, Baltimore, in 1931 and I interned in the University of Maryland, Baltimore Eye, Ear, Nose and Throat Hospital, and Baker Sanitarium, and got my first post-graduate at Baltimore Eye, Ear, (Tr. p. 230) Nose and Throat at Baltimore.

Q. When were you admitted to the practice of medicine?

A. In 1933.

Q. Was that the general practice of medicine?

A. Yes, sir.

Q. When did you limit your practice?

A. 1935.

Q. To what branch of medicine?

A. Eye, ear, nose and throat.

Q. What professional societies are you a member of?

A. I belong to American Medical Society, Robeson County Medical Society, North Carolina State Medical Society, and North Carolina Eye, Ear, Nose and Throat Society.

Q. How long have you known Mr. Thomas B. Lilly?
 [fol. 74] A. Since 1935.

Q. How long have you known Helen W. Lilly?
 A. Since 1937.

Q. What business are they engaged in?
 A. In the optical business.

Q. You know the name of the firm?
 A. City Optical Company.

Q. Explain some business contacts that you have had with the Lillys and what you know about their business.

A. When I first started practicing in Lumberton I started to give my business to American Optical Company and (Tr. p. 231) the Southeastern.

Mr. Lilly called on me and for 2 or 3 years I gave him a small amount of business and I think in 1940—1938 or 1940—I began giving more business to City Optical Company and, around 1941 or 1942 I was doing 100 percent business with the City Optical Company in Wilmington.

(Tr. p. 232) Q. Dr. Hedgpath, one of the important questions in this case has to do with trade discounts allowed doctors by the City Optical Company. Could you tell us briefly your experience with trade discounts and what they are?

A. They call it that. I thought it was service we rendered after we gave out glasses.

When you came into my office and I examined your eyes I advise you to come back for a recheck to see if the prescription is properly filled and the lenses fitted. Ordinarily a pair of glasses will last a patient from 2 to 3 years under ordinary conditions. Some patients don't come back and the majority do for a recheck.

[fol. 75] In the majority of cases during that 2 years time (Tr. p. 233) they lay down and go to sleep and get a misadjustment of their frames and sometimes we make a mistake in the lenses, especially with astigmatism, with the axis, and we have to send them back and have them reground. There is no charge to the patient if they come in 5 or 6 times for adjustments.

Q. Dr. Hedgpath, I wear glasses. Suppose I came to you as a patient and you examined my eyes and you wrote

out a prescription for new glasses or adjustments. Tell what you would say to me as a patient and what I would do with that prescription, and then what would happen afterwards with regard to the manufacture of those glasses.

A. The prescriptions I have have "City Optical Company" printed on the bottom just like my drug store prescriptions have the name of the drug store. I do not tell you where to get them but I tell you to get these glasses fitted.

We have a lot that go to Fayetteville, to McBride, and other companies also, and some go to Wilmington as they have been getting them from Wilmington.

What was the last of the question?

Q. After I go to the optical company to have my glasses made do they—

A: At the end of the month the ones that go to the optical company—talking about the City Optical Company—after the 10th of the month we get a check and a list of the prescriptions that were filled there and a check for 33 and (Tr. p. 234) a 3rd percent of the amount of money that was taken in on these prescriptions.

Q. That is the retail price of the glasses?

A. Yes, sir.

[fol. 76] Q. Did you ever do any dispensing yourself?

A. Yes, sir.

Q. When you dispensed glasses yourself how did you procure the glasses for your patients?

A. I bought the frames wholesale.

Q. And then when you sold the glasses to the patient what did you charge the patient?

A. Charged him the retail prescription prices listed by American Optical and Southeastern and all optical companies.

Q. What was the difference between the profit you made on the dispensing you did yourself and this trade discount for dispensing made by City Optical Company, in your opinion?

A. In my opinion we made a lot more money when dispensing ourselves, but doing a combined practice I did not have time and had someone else do the work for me for the difference in money.

Q. Is this a very widespread custom with regard to trade discounts allowed doctors?

A. Yes, sir.

(Tr. p. 235) Q. How did you consider these trade discounts when you received them? How did you treat them on your books and records?

A. They went down in my deposits as money received from my profession.

Q. Did you include them in your income tax return?

A. Yes, sir.

Q. Dr. Hedgpath, do you know of any Federal or state law or any public policy that the receipt of these trade discounts by you violates?

A. In my opinion, no, sir.

[fol. 77] Q. Do you know of any canon of professional ethics that the receipt of these trade discounts violates?

A. No, sir.

Cross-examination of Dr. Louten R. Hedgpath.

By Mr. Maddox:

(Tr. p. 236) Q. Now, you said when you were in Lumberton, I believe, you dealt with the American Optical Company and the Southeastern Optical Company.

A. Yes, sir.

Q. Where were they located?

A. American Optical Company was located in Raleigh and the branch of Southeastern I did business with was in Petersburg, Virginia.

Q. And you contacted them by mail?

A. Yes, sir. They had salesmen that came around too.

Q. Did you mail the prescription you wrote for the patient to them?

A. Yes, sir, with the frames.

Q. You bought the frames and mailed the frame and prescription to the American Optical Company?

A. Yes, sir, and Southeastern.

Q. And they made up the lens and put them in the frame and mailed the finished product back to you?

A. Yes, sir.

Q. And that continued, I guess, until 1946?

(Tr. p. 237) A. It continued until the City Optical Company opened a branch in Lumberton. Of course. I did business with the Wilmington branch too.

[fol. 78] Q. And between 1941 and 1946 you dealt solely with City Optical Company?

A. I would say 95 percent of my work was with them, yes, sir.

Q. Did you mail the frames to them like you did with the American Optical Company?

A. Yes, sir.

Q. And the prescription?

A. Yes, sir.

Q. And the finished glasses were mailed back to you from Wilmington?

A. Yes, sir.

(Tr. p. 238) Q. Now, the 3rd of the retail price of the glasses paid by the patient which you receive, you say is for services rendered after the glasses are received by the patient. Is that correct?

A. Yes, sir. There is no other charge for it if it is needed.

Q. What does that service consist of?

A. It consists of the patient coming in and complaining about not being able to see or having trouble, headaches following examination, and they are rechecked and occasionally you have a difference in an axis which is caused by astigmatism, and you have to have a new prescription and have it reground.

Oftentimes, an adjustment on the face, if not setting properly on the nose, will give trouble, and a lot of times you have a nervous woman and you have to do something for her anyway—or some men are the same way.

Q. That occurs with every patient you have?

A. No, sir.

[fol. 79] Q. Now, how many patients actually come back to you after they get their glasses from City Optical Company?

(Tr. p. 239) A. Let me get that straight.

Q. What proportion or what part of them actually come back after they get their glasses?

A. Well, sir, those that live close to town, you don't have any trouble with. I imagine anywhere from 50 to 60 percent come back for a check-up.

Q. What does a check-up consist of?

A. Seeing that they fit properly and if the right prescription has been put in as prescribed.

Q. Comparing the lenses in the glasses with the test lenses in your case?

A. What I prescribed.

Q. And looking at the frames to see that they fit?

A. Yes.

Q. Anything else?

A. As I said before—

Q. Isn't that the usual examination of the patient?

A. State that again.

Q. Isn't that the usual examination the patient gets when they come back?

A. For proper fitting and to see if the glasses are right, yes, sir.

Q. Now, when you examine the patient's eyes you charge him a fee, do you not?

A. I do, yes, sir.

(Tr. p. 240) Q. And I take it that fee is for the examination and the 3rd of the retail price for the glasses is for the subsequent examination that you are speaking of?

A. That is right, if they need anything further. Any [fol. 80] thing further with the glasses does not cost a cent to have it fixed.

Q. Suppose the patient breaks the glasses in his sleep as you testified to on direct examination.

A. If they break them they pay for the lens.

Q. And you get 1/3rd of that, 1/3rd of the price of the lens?

A. I get 1/3rd of that but if they bend the frames it doesn't cost them anything.

Q. Suppose they break the frames?

A. It costs to get them fixed.

Q. A new frame?

A. If you broke the temple you don't need a new frame for that.

Q. I mean part of the frame.

A. You don't need the temples then. You just get the main part, the front of the glass.

Q. Does he pay for that?

A. If he breaks them.

Q. And you get 1/3rd of that?

A. Yes, sir.

(Tr. p. 241) Q. What method do you have to determine what patients of yours go to the City Optical Company?

A. What method?

Q. Yes.

A. I have no method. As I stated, I have my own prescription blanks saying "City Optical Company." They can take the prescription where they want.

Q. Just like a drug store prescription?

A. Yes. Of course, being just one optical company in Lumberton now, 95 percent of them take them to the optical company there.

[fol. 81] Q. Do you get a rebate on the drug store prescription like you do on the eye glass prescription?

A. I don't get that. I get a percent off my bill, yes, sir.

Q. And when you give the prescription to the patient or whenever you contact the patient, do you tell him that you will get 1/3rd of the price he pays for the glasses?

A. I have had 3 or 4 to ask me and I have told them. If they don't ask me I don't tell them.

Q. They don't as a rule ask you?

A. No, sir.

Q. To what do you attribute that fact?

A. What fact?

Q. That they don't ask.

(Tr. p. 242) A. I don't know whether they don't care or don't know. I don't know that.

Q. But you don't volunteer it?

A. No, sir.

Q. Why don't you volunteer that information?

A. I didn't think any professional men volunteered where he got his money, whether it is a fee for practicing law or practicing medicine or anything else, sir.

Q. Now, you say the practice is widespread. I take it you mean it is a practice followed by all optical companies and all eye doctors.

A. It is something that was practiced when I started practicing sir, and to my knowledge it is all over the United States.

Q. Practiced by all optical companies, and all eye doctors. Is that correct?

A. As far as I know, sir.

Q. Have you read anything on the public policy question about this practice?

[fol. 82] A. I have read what was in the paper. That is all I have read about it, sir. The Medical Society of North Carolina has not acted on it as far as I know.

Q. Has it been discussed at meetings?

A. Not to my knowledge. I was not in on any where it has been.

(Tr. p. 243) Q. Has it been discussed out of meetings among the profession?

A. You mean for North Carolina doctors?

Q. Yes.

A. The only thing I know has been discussed is what I read about the doctors in Chicago, about bringing up the civil action.

Q. There is nothing else that you recall?

Ä. No, sir.

Direct examination of Mrs. Helen W. Lilly.

By Mr. Thigpen:

(Tr. p. 301) Q. Where do you live?

A. Wilmington.

Q. How old are you?

A. I was born in 1905, 43 years old.

Q. That would make you

A. 43, pretty near 44.

Q. Tell us briefly your educational training.
A. I was educated in the public schools of Virginia and Farmville State Teachers College; took a B. S. in education at Farmville.

Q. What have you done prior to 1937, prior to your (Tr. p. 302) marriage?

A. In 1924 I started teaching school and taught in the [fol. 83] public schools of Virginia and North Carolina for 6 years; got tired of it and went into Thalhimer's in Richmond as assistant buyer in sportswear and was there 18 months.

I liked teaching school a little better and came to Wilmington in 1933 and I taught the seventh grade in the William Hooper School there until 1937.

• • • • • (Tr. p. 303) Q. When did you marry?

A. October, 1937.

Q. Who did you marry?

A. Thomas B. Lilly.

• • • • • Q. After your marriage did you accompany your husband on any trips?

A. Yes, sir. I was already interested in eye work and I am very much interested in being with Mr. Lilly, and I began traveling with him immediately.

Shortly after our marriage we went to Cincinnati to a jobber's convention. There I met the factory representatives (Tr. p. 304) and got to know them and saw their exhibits and got interested in the wholesale end of the business.

That was the first time I had become interested in that side of it. I had been a customer and seen it from that angle for some time.

• • • • • (Tr. p. 305) Q. Did you have occasion to go to Richmond any time shortly after your marriage or about that time?

A. Just before I was married I was in Richmond almost [fol. 84] continuously because I was getting a trousseau, seeing friends there. My home is not far from there. Since then I have been to Richmond consistently.

Q. Do you know when the Richmond branch of the City Optical Company was opened?

A. Yes, sir, 1938—the fall of 1937, I mean.

Q. Did you ever discuss the opening of that branch with Mr. Lilly?

A. Naturally. I was quite interested in a branch being in my home locale.

(Tr. p. 319) Q. Mrs. Lilly, I show you an individual income tax return for 1943 and ask who signed that return.

A. I did.

Q. Your signature is on there?

A. Yes, sir, right here (indicating).

(Tr. p. 320) Q. That is your 1943 income tax return?

A. That is right.

Q. I show you the schedule attached to that return and ask you to read the heading on it and the first two items with figures opposite them.

A. "Helen W. Lilly trading as Duke Optical Company, Wilmington, North Carolina, December 31, 1943. Statement of income and profit for year. Merchandise sales \$32,166.04."

Q. The next item.

A. ~~Less~~ discounts and allowances \$6,568.87.

Mr. Thigpen: Petitioner offers in evidence the taxpayer's individual income tax return for the year 1943.

Mr. Maddox: No objection.

[fol. 85] The Court: Received with the right to substitute a photostatic copy.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 30.)

By Mr. Thigpen:

Q. Mrs. Lilly, I show you the 1944 income tax return and ask you if that is your signature on it.

A. Yes, sir.

Q. And that is your income tax return for 1944?

A. That is right.

Q. I show you a schedule attached to that return and ask you just to read the heading of it and then the first two (Tr. p. 321) items under "sales."

A. "Duke Optical Company, Fayetteville, North Carolina, profit and loss statement year ended December 31, 1944. Merchandise sales \$28,489.07, less trade discounts and allowances \$4,98.35."

Mr. Thigpen: Petitioner offers in evidence that individual income tax return for the year 1944.

Mr. Maddox: No objection.

The Court: Received with the right to substitute a photostatic copy.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 31.)

(Tr. p. 325) Q. Mrs. Lilly, one of the principal issues in this case has to do with trade discounts allowed. Will you please tell His Honor what you know about trade discounts allowed?

[fol. 86] A. When I started traveling for the company and in the interest of the company, I soon learned that trade discounts were allowed doctors for whom we dispensed. I learned they were allowed by other companies to doctors that they dispensed for, because when we wanted to open a new shop in a town that another company was dispensing in, and who were giving trade discounts, we had to sell them on the idea that our work was better.

We consider that those patients belong to the ~~de-~~ (Tr. p. 326) tors, that they go to the doctors for their eye care and that that doctor is going to look after, and he does look after, his patients, not for the few minutes the patient is in the office being examined, but throughout the life of the glasses and, in towns where we do not dispense glasses, where they fit them themselves and do the mechanical work, the patient has to go back to the doctor for fittings and adjustments and refracting at times.

When we went into a town to try to get the doctors to agree to let us do their dispensing for them, they immediately said "No, we don't want to give up the profit we make on the sale of glasses," and I believe in most business the person who distributes gets a profit for so doing, and, we would offer our services to fill the prescriptions, grind the lenses, fit them to the frames and adjust them, and pay them $\frac{1}{3}$ rd of the retail price of the pair of the glasses paid by the patient and, give to the doctor a list of the patients and what they paid at the end of each month.

[fol. 87] Direct examination of L. THOMAS DUKE.

By Mr. Thigpen:

(Tr. p. 367) Q. Mr. Duke, where do you live?

A. Fayetteville, North Carolina.

Q. How old are you?

A. 34.

Q. How long have you lived in Fayetteville?

A. Approximately 15 years.

Q. What business are you engaged in?

A. Optical business.

Q. How long have you been in the optical business?

A. Approximately 18 years.

(Tr. p. 371) Q. Mr. Duke, I hand you this book and ask you to look at the first few pages of it and tell us what that is.

A. This is daily summary beginning

Q. Daily summary of what?

A. Daily summary of the business.

Q. Daily summary of the business. You mean by that the sales?

A. Of the Duke Optical Company.

(Tr. p. 372) Q. What do you record in that book, Mr. Duke?

A. I beg your pardon.

Q. What is recorded in that book?

A. Daily sales.

Q. The daily sales. Do you know anything about trade discounts allowed doctors?

A. Yes, sir.

Q. Will you tell His Honor, please, how those trade [fol. 88] discounts were computed and recorded upon the books of the Duke Optical Company, the daily sale summary which you have before you?

A. The patient's name was entered and the amount of money they paid the Duke Optical Company, under the heading of the doctors.

Q. Then at the end of the month what happened?

A. At the end of the month we gave $\frac{1}{3}$ back to the doctor.

Q. You computed the total amount in the column under the doctor's name and divided by 3 and remitted to him $\frac{1}{3}$ rd of the amount collected from the patient?

A. That is right.

Q. Who was ostensibly his patient?

A. That is right.

The Court: Will that book be inquired about any further during the trial? If so let it be marked for identification as the book from which this witness just testified.

Mr. Thigpen: No, sir, it will not be. I propose, if Your Honor please, to offer and tie up the treatment of these discounts in due course. I merely want this manager to demonstrate his knowledge of the practice and how it was actually done.

By Mr. Thigpen:

Q. Mr. Duke, if a patient came into the Duke Optical Company to buy a pair of glasses without a doctor's prescription, would he pay any more or any less than a patient who comes in with a prescription from a doctor for a pair of glasses?

[fol. 89] A. We cannot sell him a pair of glasses without a prescription.

Q. Maybe I am a little awkward in my wording. Suppose I came in and wanted a set of frames and I had not been in to see you before and was not a patient of any doctor. What price would you charge me for those frames?

A. That would depend on the type of frame you selected.

Q. Would you charge me the same price you would if I selected the same frames under a doctor's prescription?

A. Yes, sir, the same price.

Cross-examination of L. Thomas Duke.

By Mr. Maddox:

(Tr. p. 375) Mr. Maddox: May I see the book you showed the witness, Mr. Thigpen?

(Tr. p. 376) Q. Now, will you turn to the page you were referring to when you testified on direct examination with reference to the trade discounts allowed?

A. I was referring to January 3rd.

Q. This record before you?

A. This one.

Q. Which one, on the right or left?

A. They are the same.

Q. Now, Mr. Witness, do you have an account in this book designated "Trade Discounts Allowed"?

A. Yes, there are 5.

[fol. 90] Q. Will you show me those?

A. The first 5 (indicating).

Q. Where do those words appear, "Trade Discounts Allowed"?

A. The heading in the first column.

Q. What is that word there (indicating)?

A. "Kesler".

Q. And that means what?

A. That was the doctor's name, his last name.

Q. But there is no account in the book which has as a heading "Trade Discounts Allowed"?

A. That is the way we always wrote the doctor's name in.

(Tr. p. 377) Q. And the doctor's name at the head of the column is what you refer to as "Trade discount Allowed"?

A. That is correct, sir.

Q. Now, I wish you would run through that book casually and tell me if there are any other accounts in any other columns with any other doctor's name, other than the name of Dr. Kesler heading it.

A. January 4, Dr. O. L. McFaydgen.

Q. Examine the complete book. I don't want you to turn it leaf by leaf.

A. Is there any particular date you would like to have?

Q. Just observe it.

A. Dr. McCoy.

Q. In going through that book, Dr. Kesler is the principal doctor to whom you paid the socalled trade discounts allowed, isn't he, in 1942, and 1943?

Mr. Thigpen: If Your Honor please, the book relates only to 1944, I think, not to 1942 and 1943.

[fol. 91] Mr. Maddox: It looks like there was apparently an error in the first page. It is headed 1943. The first page is dated 1943 by mistake perhaps.

By Mr. Mattox:

Q. Was he the doctor from whom most of the business came in Fayetteville, Dr. Kesler?

(Tr. p. 378) A. Yes, sir.

Q. In 1944?

A. Yes, sir.

Q. Was there any other optician in Fayetteville?

A. Two.

Q. Who were they?

A. City Optical Company and McBride Optician.

Q. Did you have complete machinery in Fayetteville?

A. Yes.

Q. Now, you mentioned the price of frames, what you would charge a person who came in without a prescription. How do you determine that price?

A. How do we determine the price?

(Tr. p. 379) Q. Yes, how do you determine the price of the frames.

A. The quality of the frame determines the price.

Q. Depending on the quality of the frame how do you determine the price?

A. Depending on the quality of the frame.

Q. Where do you get the price, from a catalogue?

A. No, we don't have any catalogues.

Q. How do you determine the price?

A. That is based on wholesale prices throughout the business. I guess they figure that on a margin of profit.

[fol. 92] Q. You fixed the price yourself?

A. Yes, sir.

Q. And you could have sold the person without a prescription for a less amount than you indicated in your direct examination?

A. I don't know. We have to figure our overhead somewhere.

Q. Well, in filling a prescription you know a 3rd is going to the doctor, do you not?

A. That is correct.

Q. And in not filling the prescription you have at least a 3rd leeway. Is that right?

A. That is right.

Q. If you were to reduce the price of the frame $\frac{1}{3}$ rd to the customer without a prescription—

(Tr. p. 380) A. You could.

Q. Did you do that?

A. No.

Direct examination of EMILE C. BRYAN..

By Mr. Thigpen:

Q. Mr. Bryan, where do you live?

A. Richmond, Virginia.

Q. How old are you?

A. 35.

Q. What business are you in?

A. The optical business.

Q. How long have you been in that business?

A. Since 1931.

Q. What is your present connection?

[fol. 93] (Tr. p. 381) A. I am manager of the office.

Q. What office?

A. Richmond Optical Company.

Q. Who owns the Richmond Optical Company?

A. Mr. and Mrs. Thomas B. Lilly.

Q. How long did you say you had been in the optical business?

A. Since 1931.

Q. Briefly tell His Honor where you have worked in the optical business.

A. I worked in the optical business starting in New Orleans, and from there I went to Nashville, Tennessee, then to Jackson, Tennessee, to Memphis, Tennessee, and then to Wilmington, North Carolina.

Q. For whom did you work in Wilmington, North Carolina?

A. Mr. Thomas B. Lilly.

Q. When was that connection?

A. In 1941.

Q. When did you go to Richmond?

A. I went to Richmond in 1941.

(Tr. p. 382) Q. In your wide experience in the optical business did you ever come in contact with what we call trade discounts allowed?

A. Yes, sir.

Q. Explain to His Honor what trade discounts allowed really means in your experience.

A. A trade discount is a refund made to the doctor on the gross sales resulting from prescriptions or business directed to us by him.

Q. Mr. Bryan, I show you these leaves of ledger sheets [fol. 94] or papers, whatever we want to designate them, and ask if you can identify that group of papers.

A. This is a portion of the summary book, a record of each day's business for the month of January, 1942.

Q. The month of January, 1942?

A. Yes, sir, 1942.

Q. Take any page you have open there. Will you explain to His Honor how, in the Richmond branch, you kept track of the sales you made upon doctor's prescriptions and determined the trade discounts allowed and paid to those doctors in January, 1942, and which I take it is the same (Tr. p. 383) practice in 1943 and 1944.

A. We kept a column on the extreme left-hand side, a detailed column of each amount of cash collected for each particular doctor. Each doctor has his heading on the column and at the end of the month it is totaled up for each doctor and he receives a portion of that total amount.

Q. Roughly, what is that portion of that total amount?

A. It is 33 and a 3rd percent.

Q. 33 and a 3rd percent?

A. 33 and a 3rd percent.

Cross-examination of Emile C. Bryan.

By Mr. Maddox:

(Tr. p. 385) Q. Now, as manager, aside from suggestions from Mr. (Tr. p. 386) Lilly, how do you run the Richmond Optical Company in Richmond? Just what are your duties? [fol. 95] A. I wait on the public, take the prescriptions in, deliver the prescriptions.

Q. Do you supervise the mechanical end of it?

A. I supervise the mechanical end of it.

Q. Do you call on doctors?

A. Yes, sir.

Q. Do you call on other optical companies?

A. No, sir.

Q. You don't do business with any other optical companies?

A. No, sir.

Q. Your business is strictly with patients.

A. Yes, sir.

Q. Of oculists?

A. Yes, sir.

Q. How often do you visit the doctors?

A. I don't visit them at any particular time. I don't have any definite time to visit them. I see all of them occasionally.

Q. Did your duties as manager include the drawing of the checks for the 33 and a 3rd percent that went to the doctors?

A. No, sir.

(Tr. p. 387) Q. Who did that?

A. That was done in Wilmington.

Q. Done in Wilmington?

A. Yes.

Q. You accumulated the total in the column in the book that you referred to?

A. Yes, sir.

Q. Did you keep that book, you yourself?

A. Are you referring to the summary book?

[fol. 96] Q. The book that you referred to in your direct examination.

A. Yes, sir.

Q. And from that book you extracted the figures and mailed them to Wilmington. Is that it?

A. That is correct.

Q. Now, referring to the paper that you referred to in your direct examination—did you refer to it as the sales journal?

A. I believed I referred to it as the summary book, a record of each day's transactions.

Q. And on the first page, January 2, 1942, in a column headed "Thos" what does that indicate?

A. Dr. Thomason.

Q. And the next one is "Shep"—what does that refer to?

A. Dr. Shepherd.

(Tr. p. 388) Q. And the next one is "Perkins".

A. That is correct.

Q. Now does each sheet represent a month?

A. Each sheet represents a day each double sheet.

Q. Now, take the item "J. R. Cole" and under "Perkins" you have \$10 listed. What was the amount charged the patient in that instance?

A. The amount charged the patient was \$10.

Q. And you remitted \$10 to the doctor?

A. No, sir.

Q. The \$10 means the amount of the patient's charge?

A. \$10 was the amount collected from the patient.

Q. And at the end of the month under "Dr. Perkins" you would have the total amount charged?

[fol. 97] Do you have before you the total figure for Dr. Perkins for that month?

A. No, sir. I could get it by adding these columns up.

(Tr. p. 389) Q. At the end of the month then you go through each page and total each column and arrive at the total amount in that manner?

A. That is correct.

Q. And you mail that information to Wilmington. Is that correct?

A. That is correct.

Q. You don't take 1/3rd of it?

A. Well, we divide it by 3 and put the 33 and the 3rd per cent down, or we send it in as a total and they do that.

Q. I am trying to find out what you send to Wilmington. Do you send the total of that amount charged—

A. An itemized list of—

Q. Wait a minute. Do you send a total of the amounts charged Dr. Perkins' patients?

A. That is correct.

Q. Or do you send 1/3rd of that amount?

A. We send the total of the amounts charged to his patients.

Q. But no where in this record is shown the total for the month!

A. No, sir.

Q. Now, in this record which you say is typical of the record kept in this respect, is there any account headed "Trade Discounts Allowed"?

(Tr. p. 390) A., No, sir.

Q. Where did you get that designation?

A. What designation?

Q. Trade Discounts allowed.

[fol. 98] A. It has always been customary to call it that.

Q. Did you ever hear it called anything else?

A. I have heard it referred to as commissions, doctors' commissions or rebates.

Q. Anything else?

A. I recently heard it referred to as a kick-back.

Redirect examination of Emile C. Bryan.

By Mr. Thigpen:

(Tr. p. 391) Q. Mr. Bryan, those sheets you have there are a mere summary of the sales. Is that correct?

A. That is correct.

Q. And those sheets do not purport to accrue any trade discounts allowed to doctors, do they?

A. No, sir.

Q. This is just a record of sales made on doctors' prescriptions and the amounts collected?

A. That is correct.

Q. Mr. Bryan, if a patient came to you in Richmond and purchased a pair of frames without a doctor's prescription, would that price be the same that a patient would pay if

he came in and bought a pair of frames with a doctor's precri~~p~~ (Tr. p. 392) tion?

A. Yes, sir.

Recross-examination of Emile C. Bryan.

By Mr. Maddox:

Q. Just a question or two. Did you keep a record in [fol. 99] Richmond of amounts accrued to doctors other than the record that you have in your hand?

A. No, sir.

Q. The record you have in your hand, does that consist of the sole record kept in Richmond?

A. Yes, sir.

Q. No other record?

A. No, sir.

Q. And from this record you transmitted the information to Wilmington?

A. That is correct.

Q. With reference to the last question Mr. Thigpen asked you about the frames, how do you ascertain the price you are going to charge the customer for the frame?

A. We have an established price!

Q. And in what form is that established price? Where do you look for that?

A. It is in line with other optical companies' prices.

Q. Well, if you wanted the price on a certain frame (Tr. p. 393) where would you go to find it?

A. We would know the prices of the frames!

Q. How do you first know then when a new frame comes in that you have never before seen; how do you ascertain the price?

A. We know what to sell it for by our costs and from knowing what it sells for in other places in Richmond.

Q. Do you go around to the various stores to find out what they are selling for in order to find out what to charge for the frame?

A. I have on occasion.

Q. Is there such a thing as a price list?

A. I have not had a printed retail price list.

[fol. 100] Q. Have you had one unprinted, a typed price list?

A. No, sir.

Q. Have you had any price list other than printed?

A. No, sir.

Q. Do you ever inquire of Mr. Lilly as to the price of a frame, for instance?

A. Yes, sir.

Q. Where do you frames come from that you sell in Richmond?

A. From City Optical Company in Wilmington.

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Direct examination of WILLIAM H. LIGHTFOOT.

By Mr. Thigpen:

(Tr. p. 394) Q. Mr. Lightfoot, where do you live?

A. In Greensboro, 115 South Tremont Drive.

Q. How old are you, Mr. Lightfoot?

A. 40.

Q. What business are you engaged in?

A. The optical business.

Q. How long have you been in that business?

A. Nearly 24 years.

Q. How — have you been in Greensboro?

A. 18—I am in my 19th year now.

Q. For what optical companies have you worked?

A. Well, originally in Newport News, Virginia for the White Optical Company where I learned the business. I came to Greensboro with American Optical Company and was with them (Tr. p. 395) nearly 10 years, and I came with the City Optical Company in the year 1939.

[fol. 101] Q. Mr. Lightfoot, I show you these sheets and ask you to tell His Honor please, what this represents, what these pages are supposed to record.

A. These are pages from our summary book that is kept (Tr. p. 396) daily.

Q. Summary book of what?

A. City Optical Company of Greensboro.

Q. What do they reflect?

A. They reflect the amounts collected for each doctor and credited to their accounts.

Q. How would you collect an amount for a doctor?

A. I would collect the retail price.

Q. From whom?

A. From the patient.

Q. So if a patient brought a prescription in and paid the retail price you would enter the amount collected from the patient on those summaries, would you?

A. That is right, according to which doctor it was. We have a column here for it.

Q. What would you do with those summaries?

A. You mean the amounts collected?

Q. Yes.

A. We would put that in the book and credit his account.

Q. You don't mean the bank account of the doctor?

A. Oh, no, City Optical Company.

Q. You have some columns in that book. How would you reflect the interest of a doctor in any amount collected on those summary sheets?

(Tr. p. 397) A. Let's see if I get you straight. You mean the amount I would pay him back?

Q. Say you sold a pair of glasses on a doctor's prescription—

[fol. 102] A. That is right.

Q. To a patient.

A. That is right.

Q. Do you have any patients listed there?

A. Yes, sir.

Q. Take any patient and explain to His Honor what happens.

A. Here is one for Mrs. Frank Joyce. We collected \$27. That amount was put in that particular doctor's column. Then we deposited \$27 in our bank account.

Q. At the end of the month what do you do with the record there?

A. I would add the column up and pay a certain per cent.

Q. How much per cent?

A. Usually 1/3rd.

Q. 1/3rd of the total amount credited in the doctor's column would then be paid—

A. To that doctor.

Q. To that doctor?

A. To that doctor, yes, sir.

Mr. Thigpen: The Petitioner offers in evidence (Tr. p. 398) this group of ledger sheets showing the daily summary of sales in order to reflect the determination of the trade discount allowed at Greensboro, North Carolina, and we propose, if Your Honor please, to further show the connection.

Mr. Maddox: Your Honor, may I ask the witness a question or two?

The Court: What is this document you are offering? There are a number of loose leaves together. What are they?

[fol. 103] Mr. Thigpen: A summary of the daily sales record at the Greensboro office of City Optical Company for the month of September, 1944.

The Court: That is just an example to show how that record was kept?

Mr. Thigpen: To also show how the determination of the amount of trade discount paid for the month of September was actually computed and determined and paid.

The Court: Is there objection to the authenticity of the record?

Mr. Maddox: Yes, Your Honor.

The Court: Is this document kept by you or under your supervision?

The Witness: It is kept under my supervision and I have the big summary book that came out of at the office.

The Court: That is just offered as an example showing how the records are kept?

(Tr. p. 399) The Witness: Yes, sir.

The Court: You are swearing those papers were kept, that the writing was put on there under your supervision?

The Witness: Yes siree.

The Court: Overruled; exception; received.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 35.)

[fol. 104] By Mr. Thigpen:

Q. Mr. Lightfoot, within the column for Dr. Taylor—
A. That is here. This is it. This is designated as "T

and S" which means Taylor and Strickland. This is the first column right here (indicating):

(Tr. p. 400) Q. Mr. Lightfoot, on the inside there is a column head?

A. Doctors T. and S, which means Doctors Taylor and Strickland.

Q. In which the amounts received or collected from patients of those doctors are recorded?

A. Yes, sir.

Q. At the end of the month did you total up the amounts credited or recorded in that column?

A. Yes, sir, I certainly did.

Q. And in the month of September, 1944, you actually made such a total?

A. Yes, sir.

Q. Then after you made the total what did you do?

A. After I made the total I wrote a check.

Q. But the total is the amount collected from the patient?

A. Yes, sir.

Q. And after you got the total amount collected from the patient, how much or what portion of the total amount did you compute?

A. I would take 1/3rd of it.

Q. You would take 1/3rd of it?

(Tr. p. 401) A. Yes, sir.

[fol. 105] Q. Have you actually recomputed one of those columns recently, or that column for Dr. Taylor?

A. Yes, I added it up, yes sir. Here is the adding machine tape.

Q. Is that the adding machine tape upon which you totaled up Dr. Taylor's column?

A. Yes, sir.

Q. What is the total of that column?

A. The total of the column is \$2,724.

Q. And what other figures?

A. 1/3rd of that is \$907 and that is what I paid.

Mr. Thigpen: In order to connect it up, I offer the adding machine tape which the witness has identified.

Mr. Maddox: No objection to the adding machine tape.

The Court: Received. May I ask if the total refers only to the figures contained in Exhibit 35?

Mr. Thigpen: Yes, sir.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 36.)

By Mr. Thigpen:

Q. Now, Mr. Lightfoot, on the bottom of this tape you have computed an amount. What is that amount?

A. \$908.

(Tr. p. 402) Q. Now, Mr. Lightfoot, I show you a check and ask you if that is your signature.

A. Yes, sir.

Q. What is the amount of that check?

A. \$908.

[fol. 106] Q. For what purpose was that check drawn and to whom?

A. This check was made out to cash. I took the cash and turned it over to Drs. Taylor and Strickland.

Q. Why did you get cash instead of making the check out to Doctors Taylor and Strickland?

A. That is a custom we agreed on, no purpose whatsoever. That was agreed on and that is why we did it.

Mr. Thigpen: The Petitioner now offers in evidence this check dated October 10, 1944, for \$908, which the witness has testified represents a check which was drawn for the purpose of paying the trade discounts to Doctors Taylor and Strickland.

Mr. Maddox: No objection.

The Court: Received.

(The check referred to was marked and received in evidence as Petitioner's Exhibit No. 37.)

By Mr. Thigpen:

Q. Now, Mr. Lightfoot, that check was made out to cash, wasn't it?

A. Yes, sir.

(Tr. p. 403) Q. And you personally cashed the check?

A. Here is the thing about it. Most of the time I would send the girl for the amounts. Sometimes I would get

them. Whether the girl picked up the money I don't know, but I know I gave the money to the doctor.

Q. When you gave the money to the doctor what did you get?

A. A receipt.

Q. I show you a paper and ask you what that is.
[fol. 107] A. Yes, this was given to Dr. Shahane R. Taylor.

Q. What does that state?

A. "Received of W. H. Lightfoot \$908, October 19, '44."

Q. That was a receipt for delivery to him of \$908 in currency which you obtained from cashing this \$908 check just identified?

A. Yes.

Mr. Thigpen: The Petitioner offers this receipt showing the payment to Dr. Taylor of these trade discounts for the month of September, 1944.

Mr. Maddox: No objection.

The Court: Received.

(The receipt referred to was marked and received in evidence as Petitioner's Exhibit No. 38.)

(Tr. p. 404) Q. Mr. Lightfoot, how widespread is this trade discount allowance business that has been testified to? Do you know of your own knowledge it has been going on for a number of years?

A. To my own knowledge it is all over the country.

Cross-examination of William H. Lightfoot.

By Mr. Maddox:

(Tr. p. 408) Q. Now, the summary daily book. Exhibit 35—which was prepared by whom did you say?

A. By my office girl.

Q. In what manner does she keep this?

[fol. 108] A. She will take the prescriptions and list them on there accordingly.

Q. Does she prepare this each day?

A. Yes, sir, each day as we went along.

Q. And this is the original record that was made (Tr. p. 409) September, 1944?

A. Yes, sir.

Q. Now, you say this record, Exhibit 35, represents what you collected for the doctor. Is that what I understood your testimony to be?

A. For that particular month, yes.

Q. And the amount you collected for the doctor, according to this record, was the total amount you collected from the patient. Is that correct?

A. Yes, sir.

Q. If that is true, why did you deposit the entire amount to the credit of the City Optical Company?

A. That is the way we did business. All moneys taken in for our account are deposited to the company. That belonged to the company until we turned it loose at the end of the month.

Q. Wait until I ask the question and then you can answer it. If the amount you collected from the patient belonged to the doctor, why did you deposit it to the account of the City Optical Company?

A. That is the custom we always did, at the end of the month.

Q. For whom were you working?

A. At that time?

Q. Yes.

(Tr. p. 410) A. For City Optical Company.

[fol. 109] Q. Now, if the amount collected from the patient belonged to the doctor, why is it that you transmitted to the doctor only 1/3rd of that amount?

A. The way I can answer that question—in a business we collect the money and deposit the money in the bank. At the end of the month it was the custom to pay the doctor 1/3rd of that amount.

Q. When you collect from the customer the cost or price of the finished glasses, whose money is that?

A. It is our money until we turn it loose.

(Tr. p. 411) Q. City Optical Company's?

A. That is right. If we didn't choose to pay the doctor anything we didn't have to do it.

Q. And if you said that the amount you collected from the patient was collected for the doctor, you were in error?

A. You can call it an error. We collected it for the company and we put it in his column so you would know whose account it belonged to.

Q. I asked you—

The Court: That has been answered.

Mr. Maddox: May I have it asked again?

The Court: We can't see the necessity of asking the same question twice. He said if he said that he was in error period. Is that so?

The Witness: Yes, sir.

Mr. Maddox: I take an exception to your ruling.

The Court: You may have an exception.

[fol. 110] By Mr. Maddox:

Q. What arrangements did you have with the doctors listed in this record?

A. An arrangement to dispense their glasses, deliver their glasses, take care of their payments and to collect moneys.

Q. Did you visit these doctors on occasion?

A. Yes, surely.

(Tr. p. 412) Q. What else did you do as manager of the Greensboro branch?

A. As manager of the Greensboro branch I handled it all the way through.

Q. As manager of the Greensboro branch what did you do?

A. We take care of fitting and adjusting their glasses.

Q. Did you supervise the manufacture of the glasses?

A. Yes, sir.

Q. Did you call on the doctors?

A. Yes, sir.

Q. Regularly?

A. Yes, sir.

Q. Anything else?

A. Nothing else.

Q. Now, were there any other doctors besides Doctors Taylor and Strickland who requested payment of the amount in cash?

A. No, sir.

(Tr. p. 413) Q. Now, you said the practice of paying to oculists 1/3rd of the amount charged patients was widespread all over the country.

[fol. 111] A. Yes, sir.

Q. On what basis did you make that statement?

A. I have been in the optical business for a good long while.

Q. In Newport News and Greensboro?

A. Yes, sir.

Q. Any other places?

A. No, sir.

Q. It was on a basis of your observation in those places that you make the statement?

(Tr. p. 414) A. I was assistant manager for American Optical Company and I was right up on everything concerning it.

Q. The American Optical Company is country-wide?

A. Yes, sir, branches all over the country and we received instructions out of New York for all of them.

Q. And the American Optical Company follows that practice throughout the country. Is that your understanding from your connection with the company?

A. Yes, sir.

The Court: Earlier in your examination when you were asked about the percentage paid by City Optical Company back to the several doctors

The Witness: Yes, sir.

The Court: You said, as we recall, that that amount was usually $\frac{1}{3}$ rd.

The Witness: Yes, sir.

The Court: What was it when it wasn't $\frac{1}{3}$ rd?

The Witness: Well, some doctors like for you to make [fol. 112] up the glasses and send them to their office and they will do their own collecting, and some doctors would let us take care of the making of the glasses, dispensing of the glasses and handling them, and they would only pay

us for the fitting charge. That is where the difference came in.

The fitting charge would make the glasses really (Tr. p. 415) cost less. In other words, the man that got the 3rd got less than the other man in the long run.

The Court: Was there any difference in that 1/3rd payment?

The Witness: It would either be 1/3rd or it would be on a fitting charge basis.

The Court: You said just now that either the doctor collected for himself when he did the fitting; or something else happened. What do you mean by that?

The Witness: I mean the doctor will send me a prescription. I fill the prescription and send it to his office and he would do his own collecting and I would send him a bill for the wholesale cost.

Sometimes the doctor would have the patient bring the prescription in and I would take all measurements and that is where my fitting fee came in. There would be all adjustments with no further charge to the patient. That is where he would pay me the fee.

Direct Examination of G. E. Simpson, Jr.

By Mr. Thigpen:

(Tr. p. 416) Q. Mr. Simpson, where do you live?
[fol. 113] A. Wilmington, North Carolina.

Q. How old are you?

A. 49.

Q. What business are you in?

A. Optical work.

Q. How long have you been in the optical business?

A. Since 1918.

Q. Outline briefly to His Honor your experience in the optical business up to 1943.

A. I started in Norfolk as an apprentice mechanic. I worked to top mechanic through a large plant and wanted to consolidate my work and see if I could do it all.

I worked with Edmonds in Lynchburg. I lived at that place for a number of years, took a special course through

one of the optometrists, and had my apprentice papers for apprenticeship optometry which enables me to refract in Virginia now.

During the depression I was in business for myself (Tr. p. 417) and I had an opportunity to go to work for Tom Lilly, on a 6 months' contract. I liked him and he liked me and the proposition he made me was satisfactory and I have been with him ever since. I came here as manager and worked up to general manager of City Optical Company.

Q. How long have you known Mr. Lilly?

A: Since 1930 and I knew of him or of his name, and knew his reputation since possibly 1922.

Q. How long have you known Mrs. Lilly?

A: Since possibly 1930 or 1932 or 1933, somewhere in there.

[fol. 114] (Tr. p. 421) Q. Mr. Simpson, you have been in the optical business a good many years. One of the main issues in this case is the question of trade discounts allowed to doctors. Will you (Tr. p. 422) please tell His Honor briefly what you know about that custom?

A. I have talked to optical men that travel all over the United States, Bausch & Lomb, A. O. and others. It is the general policy of the average dispensing house to operate plants or stores more or less for the doctors.

I imagine you have in mind what we call a trade discount. It is a national proposition.

I have talked to the old doctors that have reached possibly the age of 80. I have one in mind now that was telling me about years back when he graduated and was doing some practice, that policy was going on in those days, trade discounts to the doctors.

Q. Mr. Simpson, in the City Optical Company generally and, particularly in the Wilmington office, how are those trade discounts determined?

A. I don't want to get pinned down too close on the book-keeping system.

Q. Maybe I had better clear it up a little bit first. The books and records of the Wilmington Branch are not kept by you individually?

A. No, sir.

Q. Are they kept under your general supervision?

A. Yes, sir.

Q. Now, Mr. Simpson, do you know how the amount of the trade discount allowed doctors is determined?

(Tr. p. 423) A. In Wilmington it is a straight $\frac{1}{3}$ rd.

Q. $\frac{1}{3}$ rd of what?

A. Of the gross sales.

Q. Gross sales to whom?

[fol. 115] A. Of the glasses that the individual doctor prescribes.

Q. Would there be any difference in the price of a pair of frames without a prescription and with a prescription from a doctor?

A. No, sir.

Cross-examination of C. E. Simpson, Jr.

By Mr. Meddox:

(Tr. p. 430) Q. In reference to the trade discounts allowed, as you call it, you said the A. O.—did you mean American Optical Company.

A. Yes. I think American handles theirs on a fitting fee proposition.

As I say, this program over a period of years has been pretty general all over the United States. Just how the others handle it I am not positive.

Q. That has been based on what people have told you, hasn't it?

A. Yes, sir.

Q. Does the Wilmington office make eye glasses for anyone other than patients of oculists?

A. Yes, sir.

Q. And as to those what happens to the gross sales price to the patient?

A. We manufacture them for the different doctors throughout what we might call the territory. We go down as far as Charleston and come out as far as this section of the country, and on into Elizabeth City, North Carolina.

Q. If a patient comes in to have a lens made that has been broken, what happens in that case?

A. If it is an account of ours the retailer's credit is

[fol. 116] collected and the credit is returned back to the doctor, (Tr. 431-441) whether an O.D. or M.D.

Q. What does "O.D." mean?

A. Optometrist.

Q. If I should have a lense made while I was here, what would happen in that case?

A. That would go in as a retail sale. 9

Direct examination of Milton E. Howell.

By Mr. Thigpen:

(Tr. p. 442) Q. Mr. Howell, where do you live?

A. Wilmington.

Q. Wilmington what?

A. North Carolina.

Q. How old are you?

A-50.

Q. What is your business or occupation?

A. Bookkeeper.

Q. Bookkeeper for whom?

A. City Optical Company.

Q. How long have you been employed by City Optical Company?

A. Since September, I believe, 1945.

Q. Are the books kept under your supervision or do you keep the books yourself?

A. I keep some of them myself and some are kept under my supervision.

Q. Have you had occasion to become familiar with the books and records of the City Optical Company since you have been there?

[fol. 117] A. Yes, sir.

Q. Do you know how sales are kept track of from day (Tr. p. 443) to day?

A. Yes, sir.

Q. How are they kept track of from day to day?

A. Each day's business, the following morning is carried to the office and entered on what we call a summary sheet showing all cash receipts, charges to accounts receivable and become charges to the sales-account.

Q. So you do have a daily sales summary?

A. Yes, sir.

Q. Mr. Howell, I show you these sheets that are stapled together and ask you to look at the inside front cover and tell us what is recorded herein, just briefly the nature of the transaction, not all the details. Start with the top left-hand corner over here and go straight across the page explaining to His Honor this exhibit.

A. This is a summary sheet for January 1, 1944. The first item is cash sales of \$22.80. That is City Optical Company sales, retail sales made over the counter.

Q. The next item?

A. The next item is a sale made to Peter Jernegan in the amount of \$8 for the sale of an item made on a doctor's prescription. That item is in the memorandum column which is carried on this and is entered as a memorandum to Dr. H. R. Coleman.

Q. Now, look at the 4th item down there and trace that (Tr. p. 444) through for us and tell us what doctor that is credited to.

A. That is a \$5 sale credited to Dr. J. D. F. which would be Dr. J. D. Freeman.

Q. That represents what?

A. A sale made on the prescription of Dr. Freeman. [fol. 118] Q. At the end of the month what takes place with regard to Dr. Freeman's account, for illustration?

A. These various items are entered on a list and totaled up to determine at the end of the month how much business we received from Dr. Freeman during the month.

Mr. Thigpen: The Petitioner at this time offers, for the purpose of illustrating the determination of the trade discount to doctors, these sheets which are bound together for the month of January, 1944.

Mr. Maddox: No objection.

The Court: Received.

(The document referred to was marked and received in evidence at Petitioner's Exhibit No. 39.)

By Mr. Thigpen:

Q. Mr. Howell, have you had occasion to prepare a summary of the account of Dr. Freeman for January, 1944,

showing the sales and prescriptions to his patients recently, or have you had such a schedule prepared?

A. I have had it done.

Q. And these figures were taken off of that exhibit (Tr. p. 445) which we have already offered?

A. Yes, sir.

Q. To the best of your knowledge and belief is that a correct transcript of the entries of the column "J. D. F." in that daily summary sheet for January, 1944?

A. This is.

Q. What is the total of that daily summary sheet?

A. \$1,887.45.

Q. After that total is determined what takes place?

[fol. 119] A. We ascertain $\frac{1}{3}$ rd of it and give Dr. Freeman a check for 1/-rd for his discount.

Mr. Thigpen: The Petitioner offers in evidence the summary which the witness has identified, merely for the convenience in considering the exhibit heretofore offered, to connect up with the check which I will presently offer.

Mr. Maddox: No objection.

The Court: Received.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 40.)

Q. Mr. Howell, what was the $\frac{1}{3}$ rd amount computed on that?

A. \$629.15.

Mr. Maddox: What was the amount?

The Witness: \$629.15.

(Tr. p. 446) Q. I show you a check which has been identified as Petitioner's Exhibit 22 and ask if to your knowledge that is the check that was drawn in payment of the trade discount allowed to Dr. J. D. Freeman in the amount of \$629.15.

A. Yes, sir.

Mr. Thigpen: The Petitioner now offers in evidence Exhibit 22 which has been identified by the recipient of the check, the payee, and by this witness.

[fol. 120] Mr. Maddox: No objection.

The Court: Received.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 22 for identification, was received in evidence as Petitioner's Exhibit No. 22.)

• • • • •
Direct examination of CHARLES S. LOWRIMORE.

By Mr. Thigpen:

(Tr. p. 447) Q. Mr. Lowrimore, where do you live?

A. Wilmington.

Q. What business are you engaged in?

A. Public accounting.

Q. Are you a Certified Public Accountant?

A. Yes, sir.

Q. How old are you?

A. 48.

Q. How long have you been engaged in the business of accounting?

A. Since 1922.

Q. How long have you been a Certified Public Accountant?

A. Since 1932.

Q. Do you know the City Optical Company?

A. Yes, sir.

Q. Have you been employed in the auditing and examination of their books and records?

A. Yes.

Q. Do they have books and records to reflect their business transactions?

[fol. 121] (Tr. p. 448) A. They do.

Q. Are those books and records for the taxable years under consideration presently in the courtroom?

A. Yes, sir.

Q. Have you had occasion to examine those books and records for the years 1942, 1943 and 1944 for the City Optical Company and, for the years 1943 and 1944 for the Duke Optical Company?

A. I have.

Q. In your professional opinion do those books clearly and adequately reflect the business transactions of those two organizations for those years?

A. Yes, sir.

(Tr. p. 458) Q. Mr. Lowrimore, the question of trade discounts allowed is present in this case and we want to know if in your professional examination of the books and records you found that the trade discounts allowed doctors by the City Optical Company and the Duke Optical Company, were properly reflected upon the books and records of those two companies.

A. Yes, sir, they were.

Q. Was there a particular account on either books for these trade discounts allowed?

A. Yes, sir, there was an account numbered 35 in the year 1942 for the Main office and each of the separate branches, called "Trade Discounts Allowed," and for 1943 and 1944 those account numbers were 315.

Q. Would that apply to Duke Optical Company also?

A. Yes, sir, for 1943 and 1944.

Q. Upon what basis of accounting were these books kept?
[fp. 122] A. On an accrual basis.

Q. So that for each year you found accrued upon the books of account these trade discounts?

A. Yes, sir, they were even accrued monthly.

Q. I show you these papers that are bound together (Tr. p. 459) by clips or staples and ask you to look through them carefully and state if you have verified the amounts set up in those papers or on those papers, as trade discounts allowed, as having been accrued upon the books of the City Optical Company in the years 1942, 1943 and 1944.

A. We have verified these accounts and the lists as shown here are the amounts as deducted on the return and are the amounts on the books.

Mr. Thigpen: Petitioner now offers in evidence this group of papers entitled "City Optical Company, Wilmington, North Carolina, Trade Discounts Deducted on Returns," the first page of which is a summary and the column indicated by a red pencil mark shows total trade discount

for the respective years at the respective places of business, and subsequent pages in the columns indicated by a check mark and entitled "Total Trade Discount Allowed," and running through the last figure on each page under which another red line has been placed, to show the amount of trade discounts allowed, accrued upon the books of the City Optical Company in the years under consideration.

Mr. Maddox: No objection.

The Court: Received.

(The documents referred to were marked and received [fol. 123] in evidence as Petitioner's Exhibit No. 51.)

(Tr. p. 460) Q. Mr. Lowrimore, did you find trade discounts accrued upon the books of Duke Optical Company in the years 1943 or 1944?

A. Yes, sir.

Q. For the year 1943 I show you this schedule of such trade discounts allowed and ask you if you have checked those against the books and find that they have been accrued thereon.

A. Yes, sir.

Q. I show you the schedule for the year 1944 and ask you if you made a similar check and if you found that those amounts were accrued upon the books of Duke Optical Company for 1944.

A. Yes, sir.

Mr. Thigpen: If the Court please, Petitioner offers in evidence schedule entitled "Duke Optical Company, Fayetteville, North Carolina, Trade Discounts Allowed 1943," with particular attention to the total column which is indicated by a check mark, and the last figure at the bottom of the page which is at the bottom of that column, underscored by red pencil, for the purpose of showing trade discounts allowed as accrued upon the books of Duke Optical Company for the year 1943.

Mr. Maddox: No objection.

The Court: Received.

(Tr. p. 461) (The document referred to was marked and [fol. 124] received in evidence as Petitioner's Exhibit No. 52.)

Mr. Thigpen: Without repetition, the Petitioner offers a similar schedule for the year 1944 for the same purpose.

The Court: Is there objection?

Mr. Maddox: No objection.

The Court: Received.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 53.)

Direct examination of DR. E. PREFONTAINE.

By Mr. Maddox:

(Tr. p. 490) Q. What is your profession?

A. Eye, ear, nose and throat specialist, oculist for the purposes of the Court.

The Court: Of what city are you a resident?

The Witness: Greensboro.

Q. How long have you been engaged in that practice, Doctor?

A. As far as the City opticians are concerned I have been engaged since I have been established in Greensboro, but I had engaged in that practice previously with the American Optical Company.

Q. I am talking about your practice of eye, ear, nose and throat.

[fol. 125] A. Since 1931.

Q. In this proceeding the record shows that you received certain amounts from City Optical Company during the years 1942, 1943 and 1944. Can you state for the record under what circumstances you received those amounts?

A. I think that takes a little background history. The way we were operating with the American Optical Company consisted of this—

(Tr. p. 491) Q. I am speaking with reference to City Optical Company.

A. We have to have that too, if you will excuse me. We were told and we were shown by our records that we were paying the optician the wholesale price for glasses, that he was selling the glasses to the patient at a retail price and

giving us the difference between the wholesale price and the retail price, what the patient paid. All right.

When the City opticians were established over here—I don't know if it was Mr. Lilly or Mr. Lightfoot who told me they were planning to start in the optical business in the city, and that they would operate under the same plan that the American Optical Company had been operating.

Does that answer your question?

Q. My direct question was the circumstances under which you received the amounts from City Optical Company.

A. I received a check every month which was the difference between the wholesale price of the glasses and the retail price of the glasses plus a service charge.

Q. You say "of the glasses." To what do you refer? [fol. 126] A. I mean the mechanical thing, the glasses themselves, the lenses in the frames.

Q. You mean your patients' glasses?

A. My patients' glasses, the glasses that were fitted to my patients on my prescriptions.

(Tr. p. 492) Q. You say you received a payment each month?

A. Each month by check.

Q. Was that accompanied by anything?

A. It was accompanied by a statement of which I have a copy here, which shows the price that was charged to me and the price that was charged to the patient, with the difference in the margin.

Q. Was that the custom in 1942, 1943 and 1944, to send you a statement and a check each month?

A. Yes, from 1939 on.

Q. Did you receive similar statements and similar checks from the American Optical Company, to which you refer?

A. Yes.

Q. What were the circumstances under which you received checks and statements from American Optical Company?

A. The same, a check every month with a statement.

Q. Are you acquainted with the suit in the District Court of the United States in Chicago?

A. No, sir, I was subpoenaed—I don't know what the legal term was.

Q. Are you the Dr. E. Prefontaine who is a defendant in that suit?

A. Yes, sir.

Q. Has the practice of these payments by optical com- [fol. 127] panies to oculists been questioned in the medical profession?

(Tr. p. 493) A. I am sorry—I didn't get that.

Q. Have these payments by optical companies to oculists been questioned by the medical profession as a whole?

A. I have been—they are frowned upon, I would say. They are considered unethical but anything, in my estimation, that contributes to the better service to the patient and to a reduction of cost to the patient—

Mr. Thigpen: If Your Honor please, I move to strike the witness' statement that they are considered unethical. The question was with regard to whether or not they had been questioned.

The Witness: Yes.

Mr. Thigpen: There is no evidence as yet as to any action with regard to ethics.

The Court: Not until this witness said that they were considered unethical. Motion to strike denied. Exception.

By Mr. Maddox:

Q. Doctor, when a patient comes to you for an eye examination just what does that consist of? Does he have to make an appointment with you?

A. Yes, I work by appointment.

Q. Can he make that appointment at an early date?

A. Well, it depends. Of course, right now—it has varied any time from 2 or 3 days after the date of the appointment (Tr. p. 494) to [fol. 128] take him the same day and it has gone for 4 or 5 weeks.

Q. So it does require an appointment?

A. Yes, sir.

Q. Go on and tell us what the examination of the eyes consists of, in a short statement.

A. It would take a long time.

Q. I don't want you to go into detail or medical terms but tell us in medical language.

A. In my routine work it consists of seeing that the patient does not have any diseases of the eye. First you take the history, find out what the patient is complaining about and find out if it is an eye preposition he is consulting you about, and seeing there is no disease of the eye that would impair his vision, if not at the present time that might impair it later. You see that there is nothing wrong with the patient that you can determine by the eye, such as high blood pressure or diabetes—I mean excluding the pathology, as we call it, the disease.

Q. How extensive is that examination?

A. It varies. It is just looking at the patient. The history varies pretty much like the interrogation of a man on the witness stand, some have more to say than others and some tell you a whole lot of things that are irrelevant.

The length of taking the history varies with the (Tr. p. 495) individual patient.

Now, I take an hour; I set aside the period of an hour for an eye examination. In many examinations if I am not interrupted I can do it in a half-hour or 45 minutes, and some more difficult cases will take up to an hour and a half.

Q. As a result of the examination what do you do? [fol. 129] A. If treatment is necessary I prescribe treatment and if glasses are necessary I prescribe glasses.

Q. If you prescribe glasses what do you do or tell the patient, if anything?

A. I tell the patient he needs glasses and I ask him if he has a choice of optician to go to, what is the choice of an optician.

Q. Is there anything else, if they have a choice or don't have a choice?

A. If they don't have a choice I have made a practice of dividing it, City one time—we had two opticians here, the American and the City Optical Company. We still have two that I consider qualified opticians.

Q. At that point, do you tell the patient anything additional?

A. I don't tell the patient anything. I don't specify what he is going to pay for his glasses if he goes to the City Opticians or the American Optical Company which has (Tr. p. 496) discontinued that practice. I don't tell them specifically.

Q. Do you know the price which he will pay?

A. The optician?

Q. Yes.

A. I have it every month on the statement.

Q. I mean before the patient goes, do you know how much he will have to pay for complete glasses?

A. I know what he has to pay for the lens. I don't know what he will have to pay for the frame because I don't know what frame he is going to select.

Q. In what manner are you informed of the cost of the lenses?

A. If he inquires—we very seldom have an inquiry. [fol. 130] Occasionally a patient will ask "How much will that cost me," and I will say "Your lens should cost about \$13 or \$15."

Q. How are you informed as to what the cost will be to the patient?

A. I have seen the charges over and over again.

Q. Do you tell the patient anything else at that point?

A. I tell him to be sure to come back and have his glasses checked after he gets them.

Q. After he gets the glasses does he make a new appointment?

A. No, he comes in without an appointment. He asks if he will have to have an appointment and I say "Come in at (Tr. p. 497) any time and I will see you."

Q. When he comes in who does he see?

A. He sees me.

Q. At that point what do you do?

A. I check the fit of the glasses; check his vision again, check the grinding and check on myself as well.

Q. How extensive an examination or check is that?

A. That will take 10 or 15 minutes, hardly that in many cases. It depends on whether the patient has a single fault or more.

Cross-examination of Dr. E. Prefontaine.

By Mr. Thigpen:

Q. Do you know of any public policy that the receipt by [fol. 131] you of these trade discounts allowed, or these

remittances from City Optical Company that you say you have received violates?

A. Of course, we have received this summons—I think that is what you would call it—in the Federal Court in the trial against the American Optical Company and Bausch & Lomb and others.

Q. Perhaps you didn't understand my question. Do you know of any public policy that the receipt of these remittances from City Optical Company or American Optical Company (Tr. p. 498) by you violates?

A. No.

Q. Do you know of any canon of ethics of the American Medical Society or other medical societies that the receipt of such remittances violates?

A. I think that you are referring to splitting fees. The practice of splitting fees consists of dividing a fee that you get from a patient and giving part to another doctor that refers the patient to you, unknowingly to the patient. As far as this practice is concerned, I think it is generally known that it is being done, and the patient, if he wants to know it, is at liberty to know it. I don't specify the fact.

Q. But, Doctor, there is no canon of medical ethics that the receipt of these funds by you from City Optical Company violates, is there?

A. Not to my knowledge.

Q. You stated on direct examination that the practice had been questioned? By whom?

A. It has been questioned by our state society.

[fol. 132] Q. Has there been dispositive action taken with respect to this practice?

A. They said they disapproved of it. The men have not been thrown out of the society. They said in principle they disapproved of the thing.

Q. Dr. Prefontaine, I show you Petitioner's Exhibit 51 (Tr. p. 499) the page with respect to trade discount paid to doctors, Greensboro, North Carolina, and ask if your name appears thereon and the amount that is set up opposite your name for the year 1942.

A. 1942

Q. Not your list but this list (indicating).

A. It is on there.

Q. To the best of your information and belief, at the

present moment, you received approximately that amount in 1942?

A. I think I received exactly that amount.

Q. Dr. Prefontaine, I show you a similar statement for 1944 and ask you to look at that and tell us if your name appears on that schedule.

A. Yes, at the top.

Q. Did you receive the amount set forth there or approximately that amount?

A. Yes, I would think so.

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Direct examination of C. R. Mills.

By Mr. Maddox:

(Tr. p. 500) Q. What is your address, Dr. Mills?

A. Home or office?

[fol. 133] Q. Office.

A. Jefferson Building, 234, Greensboro.

Q. What is your profession?

A. Ophthalmologist.

Q. How long have you practiced that profession?

A. Since 1938 except for 3 years in the service.

Q. The record in this case shows that since 1942 you have received certain amounts from City Optical Company. Under what circumstances did you receive those amounts?

A. From glasses that my patients obtained from City Optical.

Q. From glasses that your patients obtained from City Optical?

A. That is right.

Q. What did the amount represent that you received?

A. You mean what percentage, or the amount?

Q. What did it represent?

A. Per month?

(Tr. p. 501) Q. Was it the entire amount the patient paid for the glasses?

A. I expect it was around $\frac{1}{3}$ rd. I never did attempt to figure it out.

Q. How did you receive those payments?

A. By check.

Q. How often?

A. Once a month.

Q. Did anything accompany the check?

A. Yes, sir, a statement of each patient, the charge of the glasses retail and wholesale.

Q. Now, did you receive similar amounts from other optical companies?

A. Just one other one.

[fol. 134] Q. What other?

A. American Optical.

Q. Under what circumstances did you receive those payments?

A. The same.

Q. Are you familiar with or do you know of the suit in Chicago against the American Optical Company and representative doctors?

A. I know a little bit about it.

Q. Are you the defendant C. R. Mills in that proceeding? (Tr. p. 502) A. That is right, sir.

Q. Mr. Mills, when a patient comes to you—first, does a patient have to make an appointment with you originally for an eye examination?

A. Most of the time.

Q. When a patient arrives what is the nature of the—

A. It depends upon the age of the patient.

Q. Tell us in a general way how the age enters into it and what the examination consists of.

A. Every patient under the age of 45, I put drops in their eyes and dilate the pupils and paralyze the ancillary muscle. Patients over 45 I do not have to do that.

Q. Just generally what does your examination consist of?

A. Examination of the external and internal part of the eye, and refraction.

Q. How long a period of time would you say that takes generally?

A. It depends on which is the case, whether under 45 or over. People over 45, I spend an average of 15 to 20 minutes.

[fol. 135] Q. How about under 45?

A. I spend that much more time on them the first (Tr. p. 503) time, and they come back 2 days later for a post-

Q. Those under 45—do you give them a prescription before the post, as you call it?

A. Never, because most of the time the prescription will differ after the post examination.

Q. When you give them a prescription for glasses what do you or what do you say to the patient?

A. I give them their prescription and ask where they want to go to get their glasses.

Q. And if they express—

A. There are only 2 places in Greenboro, in my opinion, where you can get first-quality lenses and frames and after December 1 it was American and City Optical and now it is Stamper Optical and City Optical.

Q. Do you refer them to either one of those companies?

A. Up until December 1st I asked them which one they preferred and most of them—

Q. Going back to 1942, what did you do?

A. Most of my patients went over to American Optical Company.

Q. Did you direct them to go?

A. Well, American Optical was the one that greeted me when I first came here in 1938, so they treated me very nicely and naturally I would reciprocate.

Q. After the patient gets the glasses and returns—(Tr. p. 504) or rather, do you tell the patient to return?

A. After they get the glasses?

Q. After they get the glasses.

A. I tell them if they have any trouble or questions about [foot 136] the glasses to come back. If they are not having any trouble or question about them they do not have to return.

Q. If they do return do they make an appointment to see you?

A. Most of them do.

Q. And what do you do at that time?

A. I check the prescription with my lensometer to see if what they gave them is correct. Once in a while there is a mistake. If the prescription is what I gave them, I ask them what their trouble is and try to explain to them what the trouble is and if I can't—

Q. You said "lensometer"?

A. That is an instrument you put the glasses on and you can determine the exact prescription.

Q. You look through this kind of microscopic affair?

A. That is right.

Q. And look through the lens that is in the glasses?

A. That is right.

Q. How long does that test of the glasses usually take?

A. About 15 seconds.

Q. How long does the whole procedure under which (Tr. 505) the patient comes back to your office and that test is made amount to?

A. After he comes back with the glasses?

Q. Yes.

A. It depends upon what type of patient it is.

Q. Take the average patient.

A. It would take from 5 to 20 minutes.

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[fol. 137] Cross-examination of Dr. C. R. Mills.

By Mr. Thigpen:

Q. Dr. Mills, I show you Petitioner's Exhibit 51 and direct your attention to the page on which appears trade discounts paid to doctors, Greensboro, 1942, and ask you to turn to the column indicated by red pencil mark and ask you to look at this schedule, the list of names and the amounts, and tell His Honor if your name appears on there.

A. Yes, sir.

Q. What amount is set opposite your name over in the column checked with the red pencil mark?

A. \$240.08.

Q. To the best of your knowledge, information and belief, did you actually receive that amount of money from City Optical Company in the year 1942?

A. I did.

Q. What did you do with that money when you received it? Did you put it in professional receipts and report it as income?

A. Yes, sir.

Q. When you received that money and at this time, do you know of any public policy that the receipt of such

amounts by you violates, any law, federal or state, or any other law, that the receipt of that money by you violates?

A. This morning I heard.

Q. Never mind this morning. Answer the question.

A. Up until this morning I did not.

Q. Up until this morning you did not. Do you know now of any public policy that that violates?

A. I am not sure but I understand the suit in Chicago [fol. 138] was won by the Government. That is all I know.

Q. Do you know of any canon of ethics by the medical profession that the receipt of such amounts by you violates?

A. I think it is unethical and unprofessional.

Q. I didn't ask you what you think. I asked if you know of any canon of ethics that the receipt of these amounts violates.

A. I have never seen any canon of ethics.

Q. The medical profession has what we call in the legal profession a canon of ethics, does it not?

A. Yes.

Q. And you have read that canon of ethics, have you not? (Tr. p. 507) A. No, sir.

Q. Dr. Mills, you say you have been practicing medicine and specializing in it since 1938?

A. That is right.

Q. And that you have never read the canon of ethics of the medical profession?

A. I don't believe I have.

Q. Don't you know whether you have or not?

A. I am pretty sure I never saw that.

Q. I mean the canon of ethics of the medical profession. You have practiced now for over 10 years and you have never seen or read the canon of ethics of the medical profession?

A. I think when we got our M.D. that it was read to us.

Q. So you have heard the canon of ethics?

A. I have heard it—

Q. Do you—

[fol. 139] The Court: Just a minute. Let the witness answer.

The Witness: I don't remember ever deliberately sit-



ting down and reading down and reading them off one by one.

By Mr. Thigpen:

Q. Did you go to medical school?

A. Yes, sir.

Q. Did they teach ethics in medical school?

A. No, sir, not to my knowledge.

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Direct examination of Dr. Hugh C. Wolf.

By Mr. Maddox:

(Tr. p. 508) Q. Dr. Wolf, will you state for the record your address?

A. Business?

Q. Business address.

A. Southeastern Building.

Q. Greensboro?

A. Yes, sir.

Q. And what is your profession, Doctor?

A. Eye, ear, nose and throat.

Q. How long have you been engaged in that practice?

A. It will be 30 years the 17th of November of this year.

Q. During all of that time have you included examination of eyes? (Tr. p. 509)

A. Yes, sir.

Q. When a patient comes to you for examination of eyes, does he make an appointment with you?

[fol. 140] A. Sometimes. As a rule I don't make appointments. I take the patients as they come.

Q. You don't make appointments ordinarily?

A. No.

Q. What does the examination consist of just in general terms and in layman's language, without going into too much detail.

A. You mean examination of the eyes?

Q. Yes, when a patient first comes to you.

A. Well, we first take a history on him and find out what the trouble is or what he is complaining of. Then we examine his vision, get his vision and, we examine him to find out if he has any pathology in his eyes and then we

find out if we can improve his vision with lenses and if he needs them.

Q. How extensive an examination is that with reference to time?

A. That depends on the patient a lot of times.

Q. As a general average, as an average proposition, what is it?

A. I would say anywhere from 15 minutes to an (Tr. p. 510) hour sometimes.

Q. As a result of that examination what do you do?

A. I don't believe I understand what you want me to tell you.

Q. Do you give him a prescription for glasses if necessary?

A. If he needs it, yes.

Q. When you give him the prescription do you tell him anything?

A. I tell him this is a prescription for his glasses and he can take it over to the optical company and pick out his frames and they will make the prescription up for [fol. 141] him and when he gets them to bring them by and I will check them.

Q. Do you designate to him what optical company to take the prescription to?

A. Sometimes I do and sometimes I don't. Sometimes they tell me where they want to go.

Q. If they don't tell you do you tell them where to go?

A. Yes.

Q. Where do you tell them to go?

A. I have been sending most of mine to the American Optical Company.

Q. After the glasses are completed and the patient gets them, does he usually come back to you?

(Tr. p. 511) A. Most of the time they do. If they are all right some of them don't, but most of them will come back for a checkup, particularly the bifocals.

Q. That is particularly those who are wearing bifocals for the first time.

A. Yes, sir. We have a lot of headaches with those people.

Q. When they do return do they have to make an appointment?

A. No.

Q. What does your examination consist of at that point when he returns with the glasses?

A. I usually check the glasses to see that they are the proper strength that I ordered and I check the frame to see that it fits, and I take his vision again without the glasses and then with them.

Q. And in testing the lens to see if they are proper, how do you do that?

A. By neutralization.

[fol. 142] Q. In what manner, with a test lens?

A. Yes.

Q. As a rule, how long does that procedure take?

A. Well, I never did time myself on it.

Q. Is it a matter of a few minutes? Is it as extensive as the first examination?

(Tr. p. 512). A. That depends on whether the patient is complaining of anything or not. Sometimes it takes longer to check him after he comes back and check the glasses than in the first place.

Q. Would you say with the average patient it takes a long time?

A. If it is a bifocal it does because you have to — practically the same thing you did the first time to see if they are right.

Q. Your first examination not only determines the lens but also the medical examination?

A. That is right.

Q. Do you go through the medical examination?

A. I already have that. I know if there is any pathology.

Q. On the second examination about how long would you say it takes?

A. 10 or 15 minutes.

Q. In this proceeding the record shows that certain amounts were paid to you in the years 1942, 1943 and 1944 by the City Optical Company. Will you state for the record under what circumstances those amounts were paid to you?

A. I got a check at the end of the month if any of my patients went over there.

Q. Was that check accompanied by anything?

(Tr. p. 513) A. By a statement.

[fol. 143] Q. What does the amount of the check represent?

A. It represented a difference between the retail price and the wholesale price plus the fitting charge that they have. In other words, I considered the optical company acted as my agent.

Q. Was that a fixed amount or fixed percentage?

A. I couldn't say that it was exactly every time the same thing.

Q. Did it vary?

A. It was somewhere around 30 percent I would say.

Q. Now, Doctor, do you have knowledge of the suit of the United States against the American Optical Company?

A. Yes, sir.

Q. And doctors—pending in the District Court of the United States in Chicago?

A. Yes, sir.

Q. Are you the Dr. H. C. Wolfe, one of the defendants in that proceeding?

A. That is right.

Cross-examination of Dr. H. C. Wolf

By Mr. Thigpen:

Q. Dr. Wolfe, you stated that you received certain amounts from the City Optical Company. How did you (Tr. p. 514) treat those amounts on your books and records?

A. Just put it down as income.

Q. Did you report it for income tax purposes?

A. Yes, sir.

[fol. 144] Q. Dr. Wolfe, do you know of any public policy that the receipt of any such amounts by you violated?

A. I didn't get that.

Q. Do you know of any public policy, that is as defined by federal or state law, that the receipt of those amounts by you at the time you received them, violated?

A. No, sir.

Q. Do you know of any canon of ethics of the medical profession that the receipt of such amounts violated?

A. No, sir.

Direct examination of DR. RALPH DEES.

By Mr. Maddox:

(Tr. p. 515) Q. Doctor, will you state your business address for the record.

A. Business address?

Q. Business address.

A. Office?

Q. Yes.

A. Southeastern Building.

Q. In Greensboro?

A. Yes.

Q. Doctor, what is your profession?

A. I am an M.D.

Q. Do you specialize in any branch of medicine?

A. Well, I do general practice.

Q. In the course of general practice do you examine eyes of patients?

A. I used to do right much but I don't do much now. I haven't for several years.

Q. Did you in 1942, 1943 and 1944.

[fol. 145] A. Yes, occasionally. I did some refraction.

Q. How long have you been practicing medicine, Doctor?

A. I have been practicing since 1909.

Q. When a patient comes to you for any eye examination is he required to make an appointment with you?

(Tr. p. 516) A. No, I don't have any appointment, don't make any appointments with anybody.

Q. When a patient comes for an eye examination would you state as briefly as you can for the record the scope of that examination?

A. For an eye examination?

Q. Yes.

A. You mean for refracting?

Q. When a patient comes to you with trouble with his eyes which results in a prescription for glasses.

A. Well, if they come up there for eye difficulty in seeing why, sometimes I refract them if I have time. If I haven't I refer a great many of them. Most folks I refract are really folks that can't pay for glasses.

Q. I didn't understand you.

A. Most of the folks I refract are people that can't pay

for glasses. I do a lot of charity on those glasses. In fact, I have really not been refracting but very few for several years.

Q. For the record, what do you mean by refracting?

A. That is testing their eyes and bringing up their vision as near as we can to correction.

Q. With lenses?

A. Yes.

Q. Is that quite an extensive examination?

(Tr. p. 517) A. It takes right much time if you do it properly. That is the only way you can do it.

[fol. 146] Q. When you give a patient a prescription for glasses what do you tell him at that time?

A. I don't tell him a thing only to go ahead and take them to the optical company and get his glasses.

Q. Do you tell him what optical company to take them to?

A. I have never given any choice at all to the optical companies.

Q. You have never directed them where to go?

A. As a rule, no. It is immaterial to me where they go to. There are 2 here.

Q. When they get the finished glasses do you direct them to return to you?

A. No, sir.

Q. Do they as a rule?

A. Sometimes they come by and, as a rule they don't return to me. I don't have them return to me unless there is some difficulty. If they are not seeing well, of course.

Q. Doctor, in this proceeding the record shows you were paid certain amounts during the years 1942, 1943 and 1944 by City Optical Company.

A. Yes, sir.

Q. Will you state for the record under what circumstances (Tr. p. 518) you received those amounts?

A. Well, I got the amounts but I have never had any agreement with either of the companies, with the American Optical Company or the City Optical Company. I never had any agreement.

Q. Under what circumstances did you receive the amounts?

A. They sent a check.

Q. Was that accompanied by anything?

[fol. 147] A. No. They have a statement on there but I have never been able to understand it.

Q. What does the amount you received represent?

A. Well, in 1943 from City Optical Company—

Q. Do you have one of the statements that you received?

A. I don't have a statement. I took this off my book.

Q. I don't want the amounts you received. I am interested in what the statement you receive from the optical company, the City Optical Company, shows.

A. That is what I was going to say. City Optical Company for the year—

Q. What information is contained on the statement you received from City Optical Company with the check?

A. On the statement—it is a sheet of paper and it gives what happened, I mean, what was done that month—

Q. What information does it contain?

(Tr. p. 519) The Court: Let the witness finish.

The Witness: They send a check showing credits. To tell the honest truth about it, I don't know how to figure it and I never have.

Q. Did you ever request the statement?

A. No, sir.

Q. Did you ever request the check?

A. No, sir.

Q. Did you receive similar checks and similar statements from the American Optical Company?

A. Yes.

Q. Now, Doctor, under what circumstances did you receive the checks and statements from the American Optical Company?

[fol. 148] A. Well, just the same procedure.

Q. Do you know of the suit of the United States against the American Optical Company and representative doctors in the District Court of the United States, in Chicago?

A. Yes, I saw that in the paper.

Q. Are you the defendant, Ralph Dees, named in that suit?

A. Yes.

Cross-examination of Dr. Ralph Dees.

By Mr. Thigpen:

(Tr. p. 520) Q. Doctor, when you got these amounts from the City Optical Company or the American Optical Company, how did you consider them and treat them on your books and records?

A. On my books!

Q. As professional income and receipts?

A. That's it.

Q. Did you report it in income tax returns?

A. Yes, sir.

Q. Doctor, do you know of any public policy that the receipt of such amounts by you violated?

A. No, sir.

Q. Do you know of any canon of ethics of the medical profession that the receipt of those amounts by you violated?

A. No, sir.

[fol. 149] **Direct examination of Dr. HORACE G. STRICKLAND.**

By Mr. Maddox:

(Tr. p. 521) Q. Will you state your address for the record, Doctor?

A. 101 North Elm.

Q. Is that your home address or office address?

A. Office.

Q. Is that in Greensboro?

A. That is in Greensboro.

Q. What is your profession, Doctor?

A. Physician.

Q. Do you specialize?

A. Eye.

Q. Any thing else?

A. I do mostly eye. I do some nose and throat.

Q. How long have you been so engaged?

A. Since 1936.

Q. When a patient comes to you for examination of the eyes, does he have to make an appointment with you?

A. Yes and no. It depends on how busy I am.

Q. Yes when and no when?

A. If we aren't busy, a lot come in without an appointment.

Q. Can you state just as briefly as you can for the record just what that examination consists of?

A. Well, we take the visual acuity and look in the (Tr. p. 522) eye grounds and check the ocular movements.

The Court: When you are describing anything of that sort please describe it in terms the layman can understand.

[fol. 150] A. We see if there is any disturbance in the motility of the eyes, the clearness of the cornea or transparent portion, the size of the pupil, whether it reacts to light and accommodation. I look to see whether the pupil moves back and forth, and then look inside the eye to see if everything is normal and have the girls put drugs in the eye that paralyzes the accommodation, and then after an hour we take them in a darkroom and finish our examination and fit lenses.

Q. How extensive an examination is that with respect to time?

A. It may vary anywhere from 5 to 45 minutes.

Q. Is that the original examination?

A. That is the original.

Q. If as a result of the examination you give a prescription, what do you do or tell the patient at that time?

A. Well, we usually tell them that they can go down to the City Optical or go to the American Optical. Most of them go to the City Optical downstairs. When we give them the prescription they go where they like.

Q. In 1942, 1943 and 1944?

A. I was away during some of 1942, 1943 and 1944.

(Tr. p. 523) Q. Were you here part of the time?

A. I left in September, 1942, and came back in 1945.

Q. During your practice have you been in practice with some other doctor?

A. Yes.

Q. With whom?

A. Dr. Shahane R. Taylor.

Q. How long has that partnership continued?

A. Since 1936.

Q. When the patient gets the completed glasses or rather, [fol. 151] when you give him the prescription and send him to the optician, do you ask him to return?

A. We instruct him if there is any trouble at all to come back and let us check his glasses.

Q. Does the patient come back usually?

A. Some come back to have the lenses checked and some come back because they have some complaint.

Q. How extensive an examination do you make at that time?

A. It depends on how [much] trouble the patient is having. If he is having much trouble, it may be that we do the whole thing over again to see if a mistake has been made.

Q. In the average case what would you say the time was that would be consumed with a patient?

A. I don't see how you can answer that, with any (Tr. p. 524) degree of accuracy. I don't know how to answer that question.

Q. Does it take a short time? Does it take as long a time as the original examination for the average patient that returns?

A. It wouldn't take as long. I just stated we might do him all over again but we don't do him all over again each time. It couldn't take as long as the original examination.

Q. In this proceeding the record shows there was paid to you and Dr. Taylor as a partnership, certain amounts during the calendar years 1942, 1943 and 1944. Will you state for the record, Doctor, under what circumstances you received those amounts from City Optical Company?

A. I don't believe I get your question.

Q. I asked you under what circumstances you received [fol. 152] certain amounts during the calendar years 1942, 1943 and 1944, or rather, the partnership of which you were a member, from the City Optical Company.

A. We received certain trade discounts during that time. Is that what you mean?

Q. You term them trade discounts. Were they amounts of money?

A. Yes, sir.

Q. In what form did you receive them?

A. I think they were all in cash. As I say, I was not here

the greater part of that time but I presume they (Tr. p. 525) were in cash.

Q. During the time you were here?

A. It was cash.

Q. Was there any reason why it was cash?

A. I couldn't answer that because I was not a partner—I don't know why—I know the first time I saw it it was cash.

Q. You were a partner in 1942, were you not?

A. I was on salary for a time. I had no prerogative as far as determining—

Q. Were you on a salary in 1942?

A. No, sir.

Q. Did the partnership of Taylor and Strickland receive amounts from American Optical Company?

A. Yes, sir.

Q. Under what circumstances did the partnership receive them?

A. That was by check.

Q. Under what circumstances?

A. Trade discounts.

Q. The same as the City Optical Company?

A. You mean the percentage?

[fol. 52] Q. Not the percentage but for the same reason?

A. Yes, sir.

Q. What was the percentage? Do you know?

A. You mean from American Optical?

(Tr. p. 526) Q. No, City Optical Company.

A. I would say the maximum was 33 and a 3/rd, but we didn't always get that.

Q. Do you know of the United States against the American Optical Company and representative doctors pending in the District Court of the United States in Chicago?

A. Yes, sir.

Q. Are you the Horace G. Strickland named as a defendant in that suit?

A. Yes.

Cross-examination of Dr. Horace G. Strickland.

By Mr. Thigpen:

(Tr. p. 526) Q. Doctor, you said you received, or your partnership received, trade discounts from American Optical Company and City Optical Company.

A. Yes, sir.

Q. How did you treat those trade discounts on the books of the partnership?

A. They were listed as income for the partnership.

Q. Were the amounts of those trade discounts included in the report of income to the partnership?

A. Yes, sir.

Q. As a result, when you reported your individual tax your proportionate part of the receipts was included (Tr. p. 527) in your individual tax return?

[fol. 154] A. Yes.

Q. Do you know of any public policy that the receipt of such amounts violated?

A. Do I know what?

Q. Do you know of any public policy, that is, any law of the United States or the State of North Carolina, that the receipt of such amounts violated?

A. No, sir.

Q. Do you know of any canon of the medical profession that the receipt of such amounts violates?

A. No, sir.

Direct examination of Dr. SHAHANE R. TAYLOR.

By Mr. Maddox:

(Tr. p. 528) Q. Doctor, will you state your business address?

A. 319 Jefferson Building.

Q. Greensboro?

A. Yes, sir.

Q. What is your profession, Doctor?

A. Eye, ear, nose and throat specialist.

Q. How long have you been so engaged?

A. Since 1924.

Q. Since 1924?

A. Yes, sir.

Q. Now, do you require a patient to make an appointment with you for an eye examination?

A. Not necessarily, sir.

Q. Will you state as briefly as you can for the record what your examination when a patient first comes to you consists of?

[fol. 155] A. It consists of taking the vision primarily to see how well they read, for distance and near, taking a tactile tension on them to see if there is any tension of the eye ball, examination of the eye ball and blood vessels and see if there is any cycloplegia.

Q. Does that complete your examination at that time?

A. They are put under drops on the first visit and after about 50 minutes they are retinoscoped and then the findings are put in the trial frame and you just look for (Tr. p. 529) astigmatism, and after that if the patient is under 40 years old, or there is any reason to suspect that it might be an increase in tension in the eye since the previous examination, and then an examination with the Schott's tonometer.

There are many varieties of tonometers. Most are satisfactory but we use the Schott's.

Q. Would you say the examination you make at that time is quite extensive?

A. It consumes quite a bit of time.

Q. How much time?

A. Depending on the patient. Sometimes it takes 5 or 10 minutes and sometimes 35 to 40 minutes.

Q. In those cases that result in giving a prescription for glasses, what do you do when you give a prescription to the patient?

A. Well, most of the patients we give it to them, and if we don't we phone it down. Most of our business is done through City opticians.

Q. Speaking now with reference to 1942, 1943 and 1944.

A. Some are written out and some are phoned down.

Q. Back in those years is that also true, sir?

A. Yes, sir.

[fol. 156] Q. Your practice of medicine was in partnership with Dr. Strickland, was it not?

A. Yes.

(Tr. p. 530) Q. How long has that partnership continued?

A. I think it began in 1936, sir.

Q. Do you direct the patient to City Optical Company in the manner you have stated, by phoning down?

A. We do, quite frequently.

Q. At that time do you make any other statement to the patient?

A. Sometimes you would and sometimes they are supposed to come back for a checkup.

Q. Do you usually tell them to come back for a checkup?

A. We have to have them come back for a checkup.

Q. In each case?

A. Sometimes they don't but they are supposed to.

Q. Do they more often than not don't?

A. I would say 50 percent do. I am guessing.

Q. What is the checkups they come back for?

A. We check the lens again and check the strength against the strength that was ordered, and the axis of the astigmatism, and put the patient down and see how well he reads for distance and for near.

Q. How long a time does that consume, as a rule?

A. Not long, 5 or 10 minutes maybe.

Q. Now, Doctor, in this proceeding the record shows that there was paid to the partnership of Taylor and Strickland certain amounts during the calendar years (Tr. p. 531) 1942, 1943 and 1944 by the City Optical Company. Will you state for the record under what circumstances you received those [fol. 157] amounts from City Optical Company?

A. We receive 1/3rd of the price of the glasses.

Q. The price of the glasses to whom?

A. To the patient.

Q. Whose patients?

A. My patients.

Q. Under what circumstances do you receive that 3/rd?

A. I can't understand your question, sir.

Q. Did you have some arrangement with City Optical Company?

A. We had an agreement, a verbal agreement.

Q. A verbal agreement with whom in City Optical Company?

A. Mr. Lilly.

Q. Anyone else?

A. Well, he was the one I talked to. Mr. Lightfoot was there.

Q. Did you have similar arrangements with other optical companies in Greensboro?

A. American Optical.

Q. Did you receive amounts from them each month?

A. Yes, sir.

Q. And under the same circumstances?

(Tr. p. 532) A. I don't think the same circumstances. I don't know that the percentage—

Q. I am speaking now of the years 1942, 1943 and 1944.

A. I don't think the percentage was the same.

Q. Was the percentage different?

A. It was supposed to be a little larger from American Optical Company than from City. However, after many [fol. 158] years dealings with American I never was able to read the statements they sent me and neither could anyone in our office, and I don't believe you could, sir.

Q. You say the amounts received were the same except for the percentage?

A. Exactly the same.

Q. Now, Dr. Taylor, do you know of a suit by the United States against American Optical Company and representative doctors pending in the District Court of the United States in Chicago?

A. Yes, sir.

Q. Are you the defendant Shahane R. Taylor named in that suit?

A. Yes, sir, I am.

* * * * *

Cross-examination of Dr. Shahane R. Taylor.

By Mr. Thigpen:

Q. Dr. Taylor, I show you Petitioner's Exhibit 51 and (Tr. p. 533) direct your attention to the page entitled "Trade Discounts Paid Doctors, Greensboro, 1942," and ask you if your partnership appears theron listed as recipients.

A. It does, sir.

Q. How much does that statement show was paid to Doctors Taylor and Strickland in 1942?

A. \$10,095.62.

Q. To the best of your knowledge, information and belief, did you actually receive that amount of money in that year?

A. I did, sir.

[fol. 159] Q. From the City Optical Company?

A. That is correct.

Q. Now, directing your attention to a similar page for the year 1943, I will ask you if your partnership appears thereon.

A. It does, sir.

Q. How much is stated as having been paid to your partnership in 1943?

A. \$10,180.04.

Q. To the best of your knowledge, information and belief, you actually received that money from the City Optical Company?

A. That is correct.

Q. I direct your attention to a similar sheet or (Tr. p. 534) schedule for the year 1944 and ask if the name of your partnership appears thereon.

A. It does, sir.

Q. And how much is listed in the column as having been paid to your partnership as trade discounts, directing your attention to the column with the red check mark over it.

A. \$9,414.13.

Q. To the best of your knowledge, information and belief, that amount of money was received by your partnership?

A. It was, sir.

Q. How did you treat those remittances upon your books of account? Were they entered upon your books of account?

A. They were kept as a monthly statement at the bottom of the regular journal and added into the regular income tax.

Q. Dr. Taylor, do you know of any public policy as defined [fol. 160] by any federal or state law, that the receipt of those amounts by your partnership violated?

A. No, sir, I do not.

Q. Do you know of any canon of ethics of the medical profession that the receipt of those amounts violated?

A. No, sir. There has been some criticism but there is criticism of everything.

Q. But you don't know of any canon of ethics of the medical profession that the receipt of those amounts violated, do you?

[fol. 161]. PETITIONERS' EXHIBIT No. 19

Individual Income Tax Return 1942

Thomas B. Lilly

Trading as
City Optical Company and Richmond Optical Company

Schedule of Income from Business

Merchandise Sales	\$370,139.77
Add—Collections on Bad Accounts Charged Off	6,543.95
Less—Sales Discounts and Allowances	63,814.36
Net Sales	\$312,869.36
Net Cost of Sales	134,501.05
Gross Profit	\$178,368.31
Total Operating Costs	144,187.69
Net Profit from Business	\$ 34,180.62

PETITIONERS' EXHIBIT No. 17

Partnership Return of Income 1943

City Optical Company and Richmond Optical Company

Statement of Income and Profit for Year

Merchandise Sales	\$439,658.62
Sales Discount and Allowances	66,187.58
<hr/>	
Net Sales	\$373,471.04
• • • •	
Net cost of Mdse. Sold	177,037.48
<hr/>	
Gross Profit	\$196,433.56
Operating Costs:	
• • • •	
Total Operating Costs	160,812.52
<hr/>	
	\$ 35,621.04
[fol. 162] Add—Collections on Bad Accounts	
Previously Charged Off	2,887.56
<hr/>	
Net Profit for Year	\$ 38,508.60
<hr/>	

PETITIONERS' EXHIBIT No. 18

Partnership Return of Income 1944

City Optical Company

Consolidated Profit and Loss Statement

<i>Sales</i>	<i>Total</i>
Merchandise	\$466,651.64
Less: Trade Discounts and Allowances	60,188.26
Sales Discount	4,006.80
	64,195.06
Net Sales	\$402,456.58
<i>Cost of Sales</i>	
* * *	
Cost of Materials Sold	212,555.57
Gross Profit	\$189,901.01
<i>Expenses</i>	
* * *	
Total	171,836.12
Profit on Sales	\$ 18,064.89
<i>Other Income</i>	
* * *	
Other Charges	\$ 6,744.00
* * *	
Net Profit	809.50
Adjustments	
Profit for Year	\$ 23,999.39
	\$ 25,326.69

[fol. 163] PETITIONERS' EXHIBIT No. 30

Individual Income and Victory Tax Return 1943

Helen W. Lilly Trading as Duke Optical Company

Statement of Income and Profit for Year

Merchandise Sales	\$ 32,166.04
Less—Discounts and Allowances	6,568.87
Net Sales	<hr/> \$ 25,597.17
Net Cost of Merchandise Sold	<hr/> 10,303.07
Gross Profit	<hr/> \$ 15,294.10
Total Operating Costs	<hr/> 12,900.80
Net Profit	<hr/> \$ 2,393.30

PETITIONERS' EXHIBIT No. 31

Individual Income Tax Return 1944

Helen W. Lilly
Duke Optical Company

Profit and Loss Statement

Sales:

Merchandise	\$ 28,489.07
Less: Trade Discounts and Allowances	4,798.35
Sales Discounts	153.23
Net Sales	<hr/> \$ 23,537.49
Cost of Materials Sold	<hr/> 8,473.21
Gross Profit	<hr/> \$ 15,064.28

[fol. 164] Expenses:

		12,618.32
Profit on Sales		\$ 2,445.96
Other Income		
		357.32
Other Charges		
		99.00
Net Profit		\$ 2,704.28
Adjustments		
		234.90
Profit for Year		\$ 2,469.38

PETITIONERS' EXHIBIT No. 40

Wilmington Dispensing Sheet

January, 1944

Dr. J. D. Freeman

Jan. 1	Mr. L. J. Zibelin	\$ 5.00
3	Mrs. O. W. Keever	12.00
	Mr. Bert Jewell	22.00
	Mrs. Bertha Hatcher	17.00
	Bobby Jackson	11.50
	Gladys Faison	8.50
4	Mrs. Carrie West	12.00
	Romona Frink	10.50
	Mrs. W. N. Hasty	16.50

Jan. 4	Chas. Robbins	8.50
	Myrra Ketchum	8.50
	Mr. Frank Memory	17.00
	Mr. C. L. Meritt	22.00
	Mrs. C. B. Gore	12.00
	Sadie Howard	5.00
	J. A. Williams	2.00
5	Mr. O. N. Martin	16.00
	Mrs. L. H. Edwards	20.00
	Thelma Le Vane	8.50
	Myrtle Johnson	19.00
	Mrs. D. A. Foster	5.00
[fol. 165]	D. W. Stewart	8.50
6	Mrs. C. P. Love	20.00
7	Mr. W. J. Webster	2.00
	Rev. O. K. Ingram	12.00
8	Mr. W. B. Glenn	22.00
	Sylvia Ann Wilson	8.50
	Mrs. S. D. Bordeaux	16.50
10	Alma Shaw	2.00
11	Mrs. Mamie Innian	20.00
	Miss Mary Bennett	14.00
	Mrs. J. B. Taylor	18.50
	Hannah Charles	16.00
	Mrs. Sam Gore	1.00
12	L. C. Hudson	12.00
	Gilbert Shepard	8.50
	Mr. L. H. Battorm	22.00
	Miss Betty Palmer	12.00
	Mrs. A. G. Marshall	14.50
	Mr. Odell O'Quinn	17.00
	Miss Alice Blanchard	10.00
	Sadie Howard	5.00
	Mrs. Robert Simon	12.00
13	Mrs. A. W. Smith	17.60
	Mrs. Theo Salter	12.75
	Mrs. Ernest Sutton	17.00
13	Mrs. A. Pieper	10.00
	Carol Wright	10.50
14	Mrs. H. E. Williams	17.50
	Mrs. E. B. Murray	13.60

Jan. 14	Mrs. R. H. Leggett	12.00
	Mrs. R. C. Spivey	14.00
	Carrie Valerio	22.00
	Mrs. Hattie L. Stanley	10.00
	Mrs. Libb Moskowitz	17.00
	Mrs. Gussie Leyden	8.00
	Miss Florence Woodbay	7.00
15	Mr. G. A. Bame	9.00
	Mrs. J. W. Bland	10.00
	Mr. J. T. Shepard	17.00
	Miss Tonette Compton	17.00
17	Mrs. I. B. Brussels	17.00
	Mrs. Jno. Ponos	5.00
	Spurgeon Baxley	6.00
18	Gertrude Harrison	10.00
	Mr. W. J. Mintz	12.00
	Edward Green	13.50
[fol. 166]	Mrs. Mary E. Pruitt	22.00
	Mrs. C. L. DeBose	15.00
	Mrs. J. D. Elkins	1.00
	Mrs. A. J. Gardner	15.00
	Mrs. A. T. Withrow	12.00
	Mr. Charlie Gainey	15.00
	Ray Ganos	13.50
	Mr. S. A. Haines	6.00
20	Miss M. Ketchum	29.00
	Mr. and Mrs. G. B. Squires	32.00
	L. L. Wood	10.00
	Mr. Kenneth Piner	17.00
	Mr. D. H. Barnett	10.00
	Miss Maggie King	17.00
	Mr. A. J. Faye	15.50
	Miss Mary Brown	17.00
	Miss Mildred Potter	15.00
	Mrs. Hattie Stanley	7.60
21	Mr. Lundie Milliken	10.00
	Rev. J. W. Bartin	15.50
	Mrs. Judy Marks	10.40
	Mrs. J. A. Windley	22.00
	Mrs. Earl Martin	8.50
	Mrs. Chris Gallor	10.00

Jap. 21	Mrs. W. E. Boyette	20.50
	Mrs. J. V. James	2.00
22	J. A. Leimore	11.50
	Mr. O. B. Hill	19.00
	Mr. W. G. Batson	7.00
	Mrs. Alice Kornegay	22.00
	Mrs. R. B. Slocum	22.00
24	Mr. Lewis Ward	20.50
	Mrs. G. G. Thomas	7.00
	Sharon Jones	11.50
	Mr. Jacob Cooper	18.50
	Bill Park	15.50
	Mr. B. D. Price	22.00
25	Emily Moore	8.50
	Mrs. J. C. Clifton	17.00
	Lee Burch	7.00
	Billy Ezzell	8.50
	Earl Bowler	11.50
	Mr. J. O. Harwell	22.00
	Mrs. F. A. Highfall	7.00
	Mrs. E. H. Wright	13.50
	Mr. L. L. Wood	12.00
[sol. 167] Alma Shaw		1.00
26	Mr. C. Henderson, Jr.	15.00
	Ann Avery	8.50
	H. L. Webb	7.00
	Mr. Evans Byers	17.00
	Mr. W. C. Morton	6.00
	Annie Mae Powell	22.00
	Miss Sadie Sanders	17.00
	Victor Sullivan, Jr.	11.50
	Mrs. Effie Perkins	3.00
27	Mr. Vick Morris	12.00
	Celeste Eaton	7.00
	Miss Eva Lee	14.50
28	Mr. E. L. Bergeman	17.00
	Miss Evelyn Stamper	17.00
	Bobby Soles	10.50
	Mrs. T. C. Bell	20.00
	Mr. Lloyd Sellers	5.00
	Miss Mary Walter	15.00

Jan. 28	Mrs. E. J. Smith	15.00
	Mrs. W. W. Clardy	15.00
29	Mrs. Shirley Moore	17.00
	Mrs. H. Moore	9.00
	Mr. H. L. Kerr	10.00
	Miss Francis Penton	12.00
	Jean Westbrook	11.50
	Mrs. Sam Gore	1.00
31	Mrs. J. M. Hall	17.00
	Mrs. Ella Ward	19.00
	Mrs. W. H. Gaylor	25.00
	Teddy Crews	11.50
	Rush Wells	8.50
	Total	\$1,887.45

PETITIONERS' EXHIBIT No. 22.

City Optical Company Check No. 2182

Dated February 10, 1944

Payable to and endorsed by

Dr. J. D. Freeman for \$629.15

[fol. 168]

PETITIONERS' EXHIBIT No. 51

City Optical Company
Wilmington, North Carolina

Trade Discounts

Summary 1942

	Trade Discount
Wilmington and Fayetteville	\$ 37,470.18
Richmond	7,307.99
Greensboro	12,285.28

[\$ 57,063.45]

Summary 1943

Wilmington and Fayetteville	\$ 41,906.09
Richmond	7,362.10
Greensboro	12,333.76

[\$ 61,601.95]

Summary 1944

Wilmington and Fayetteville	\$ 40,125.41
Richmond	7,296.33
Greensboro	12,599.91
	<hr/>
	[\$ 60,021.65]

Trade Discount Paid to Doctors
Wilmington and Fayetteville—1942

	Total Trade Discount Allowed
Dr. S. E. Koonce Wilmington, N. C.	\$ 3,972.25
Dr. J. D. Freeman Wilmington, N. C.	8,814.12
Dr. D. B. Sloan Wilmington, N. C.	7,236.98
Dr. Paul A. Z. Black Wilmington, N. C.	4.34
Dr. J. N. Robertson Fayetteville, N. C.	39.52
[fol. 169] Dr. J. M. Lilly Fayetteville, N. C.	6,694.64
Dr. W. P. McKa	5,928.71
Dr. R. T. McFadden Fayetteville, N. C.	639.64
Drs. Freeman and Coleman Wilmington, N. C.	1,813.71
Dr. H. R. Coleman Wilmington, N. C.	2,327.17
<hr/> Totals	\$37,470.18

Trade Discount Paid to Doctors

Richmond—1942

Total Trade
Discounts Allowed

Dr. W. S. Boyce	\$14.18
Dr. E. C. Boyce	4.68
Dr. A. F. Bagby	20.51
Dr. Edgar Childrey	770.80
Dr. R. H. Courtney	901.09
Dr. S. M. Cottrell	5.51
Dr. W. S. Hodnett	1.17
Dr. Francis Lee	16.28
Dr. W. T. Mason	14.42
Dr. C. M. Miller	8.46
Dr. E. W. Perkins	3.34
Dr. Walter J. Rein	908.37
Dr. G. H. Snead	329.89
Dr. Z. B. Sheppard	1,164.99
Dr. R. C. Thomason	2,975.23
Dr. R. W. Vaughn	25.34
Dr. Pauline Williams	64.19
Dr. W. R. Weisiger	54.19
Dr. T. B. Weatherly	25.35
Total	\$7,307.99

[fol. 170] Trade Discount Paid to Doctors

Greensboro—1942

Total Trade
Discounts Allowed

Dr. H. T. Cook	\$143.60
Dr. H. F. Pate	77.83
Drs. Banner and Banner	38.75
Dr. Ralph Dees	86.35
Dr. C. R. Mills	249.08
Dr. E. Prefontaine	1,370.30
Dr. H. C. Wolf	61.51
Dr. J. N. Robertson	4.03
Dr. W. C. Carr	46.76
Drs. Taylor and Strickland	10,095.62
Drs. Barnes and Farmer	94.88
Dr. Paul Stewart	7.10
Dr. Pealer	13.82
Dr. Pate	4.65
Total	\$12,285.28

Trade Discount Paid to Doctors

Wilmington and Fayetteville—1943

Total Trade
Discounts Allowed

Dr. W. P. McKay Fayetteville, N. C.	\$5,812.21
Dr. R. T. McFayden Fayetteville, N. C.	1,448.21
Dr. J. M. Lilly Fayetteville, N. C.	4,997.74
Dr. S. E. Koqnee Wilmington, N. C.	4,567.38
Dr. H. B. Coleman Wilmington, N. C.	6,043.81
Dr. D. B. Sloan Wilmington, N. C.	8,297.94
Dr. J. D. Freeman Wilmington, N. C.	9,774.06
Dr. R. T. Kesler Fayetteville, N. C.	796.59
[fol. 171] Dr. W. B. Whitehead Fayetteville, N. C.	168.15
Total	\$41,906.09

Trade Discount Paid to Doctors

Richmond—1943

	Total Trade Discounts Allowed
Dr. E. G. Boyce	\$25.54
Dr. A. F. Bagby	48.69
Dr. L. C. Brawner	61.09
Dr. Edgar Childrey	1,687.49
Dr. R. H. Courtney	1,140.83
Dr. S. M. Cottrell	52.52
Dr. Edmunds	5.00
Dr. Clifford Folks	4.00
Dr. Francis Lee	21.01
Dr. W. T. Mason	32.19
Dr. C. M. Miller	1.34
Dr. Watson	2.67
Dr. E. W. Perkins	5.68
Dr. Luther Peters	2.34
Dr. Walter J. Rein	1,239.21
Dr. G. H. Snead	148.21
Dr. Z. B. Sheppard	186.52
Dr. R. C. Thomason	2,600.92
Dr. R. W. Vaughn	19.86
Dr. W. R. Weisiger	29.31
Dr. Pauline Williams	2.34
Dr. T. B. Weatherly	30.34
Dr. Frank Wysor	3.34
Dr. R. H. Wright	1.67
Dr. Woodward	2.34
Dr. G. Barringes Smith	5.67
Dr. J. M. Lilly	2.00
Total	\$7,362.10

[fol. 172] Trade Discount Paid to Doctors

Greensboro—1943

	Total Trade Discounts Allowed
Dr. Ralph Dees	\$42.77
Dr. W. C. Carr	32.31
Dr. H. C. Wolfe	101.91
Dr. H. T. Cooke	70.28
Dr. E. Prefontaine	1,886.61
Dr. C. W. Banner	19.84
Drs. Taylor and Strickland	10,180.04
 Total	 \$12,333.76

Trade Discount Paid to Doctors

Wilmington and Fayetteville—1944

	Total Trade Discounts Allowed
Dr. D. B. Sloan Wilmington, N. C.	\$7,434.53
Dr. J. D. Freeman Wilmington, N. C.	8,510.96
Dr. H. R. Coleman Wilmington, N. C.	5,350.37
Dr. S. Koonce Wilmington, N. C.	4,238.39
Dr. J. M. Lilly Fayetteville, N. C.	4,653.11
Dr. R. C. Kesler Fayetteville, N. C.	3,978.96
Dr. W. P. McKay Fayetteville, N. C.	5,946.08
Dr. W. B. Whitehead Fayetteville, N. C.	13.01
 Total	 \$40,125.41

[fol. 173] Trade Discount Paid to Doctors

Richmond—1944

	Total Trade Discounts Allowed
Dr. L. C. Brawner	\$632.20
Dr. Edgar Childrey	1,609.83
Dr. F. O. Fay	2.67
Dr. DuPont Guerry, III	720.02
Dr. Walter J. Rein	1,785.39
Dr. G. H. Snead	130.37
Dr. L. B. Sheppard	120.95
Dr. R. C. Thomason	2,294.90
Total	\$7,296.33

Trade Discount Paid to Doctors

Greensboro—1944

	Total Trade Discounts Allowed
Dr. E. Prefontaine	\$1,841.50
Dr. H. L. Cook	351.58
Dr. R. J. Pearce	21.65
Dr. C. W. Banner	31.10
Dr. Ralph Dees	97.66
Drs. Taylor and Strickland	9,414.13
Dr. S. LaRose	756.72
Dr. H. C. Wolfe	78.84
Dr. W. C. Carr	6.73
Total	\$12,599.91

[fol. 174]

PETITIONERS' EXHIBIT No. 52

DUKE OPTICAL COMPANY,
Fayetteville, N. C.

1943

	Dr. W. P. McKay*	Dr. J. M. Lilly*	Dr. O. L. McFayden*	Dr. R. C. Kesler*	Dr. J. F. Martin*	Dr. W. B. Whitehead*	Total
January.....	\$36.34	\$13.17	\$ 179.66	\$ 112.25			\$ 341.42
February.....		19.76	220.55	202.22	\$7.33		449.86
March.....	10.67	2.00	224.93	393.19			630.79
April.....	3.33	.67	210.08	254.93			469.01
May.....		1.66	175.22	246.23			423.11
June.....	10.73	10.67	143.57	317.50			482.47
July.....	3.20		117.49	226.82		\$20.67	368.18
August.....			63.65	470.37			555.44
September.....	13.67	5.87	116.50	487.73			655.51
October.....		2.00	43.00	604.00			649.00
November.....	8.00		.33	741.92			750.25
December.....	3.33		1.33	512.00			516.66
	<hr/> \$89.27	<hr/> \$55.80	<hr/> \$1,496.31	<hr/> \$4,569.16	<hr/> \$7.33	<hr/> \$73.83	<hr/> \$6,291.70
Sales discounts and adjustments.....							161.47
Equipment bought from Winchester Surgical Supply Co., which was furnished to Dr. R. C. Kesler and charged to trade discount.....							115.70
Total Trade Discount as Shown on Tax Return.....							\$6,568.87

* Fayetteville, N. C.

[fol. 175]

PETITIONERS' EXHIBIT No. 53

DUKE OPTICAL COMPANY

Fayetteville, N. C.

Trade Discounts Allowed

1944

	Dr. W. P. McKay*	Dr. J. M. Lilly*	Dr. O. L. McFayden*	Dr. R. C. Kesler*	Total
January		\$ 5.00	\$ 2.08	\$ 278.00	\$ 285.08
February			1.33	367.30	368.63
March		\$ 3.33	4.67	426.48	434.48
April			2.33	480.98	483.31
May				354.31	354.31
June		4.54		374.45	378.99
July		4.00		343.14	347.14
August				361.87	361.87
September	2.34	4.67		406.72	413.73
October	4.00			361.80	365.80
November	2.34			351.50	353.84
December	6.34	14.92		352.74	374.00
Total amounts actually paid in year 1944	\$18.35	\$33.13	\$10.41	\$4,459.29	\$4,521.18
Amount accrued in December, 1944, and paid in January, 1945		5.67		271.50	\$77.17
Total trade discount as shown on tax returns	\$18.35	\$38.80	\$10.41	\$4,730.79	\$4,798.35

* Fayetteville, N. C.

141

[fol. 176] Tax Court—Findings of Fact and Opinion

[Syllabus]

4. The partnership owned and operated by the petitioners during the taxable years and the sole proprietorship operated as the Duke Optical Company by petitioner Helen W. Lilly are not entitled to deduct as ordinary and necessary expenses "kickbacks" or amounts credited and paid to doctors and constituting a percentage of the amount charged by such partnership and sole proprietorship to their customers who were patients of such doctors.

[Statement of Case]

Whether the optical business carried on as a partnership by the petitioners and the sole proprietorship operated by the Duke Optical Company are entitled to deductions as ordinary and necessary expenses of amounts credited and paid to doctors and constituting a percentage of the amount charged by such partnership and sole proprietorship for the manufacture of glasses for patients of such doctors.

FINDINGS OF FACT

The petitioners are husband and wife, having been married October 2, 1937. They reside at Wilmington, North Carolina, and their returns for the taxable years were filed with the collector of internal revenue for the district of North Carolina.

[fol. 177] Petitioner Thomas B. Lilly has been engaged in the optical business since 1920. In 1922 he organized a sole proprietorship known as the City Optical Company, at Wilmington, North Carolina. Branches of this business were later, and prior to 1940, opened and operated at Fayetteville, North Carolina; Greensboro, North Carolina; and Richmond, Virginia, under the name of Richmond Optical Company.

The City Optical Company, in computing its net income, deducted the sum of payments in each year made to various

physicians specializing in care and treatment of the eyes. These payments were described upon its books as "trade discounts". The basis for these payments was an agreement or understanding between such physicians and the City Optical Company that each physician, after performing service for his patient and prescribing proper lenses would, if possible, guide such patient to this optical company for the work of grinding the lenses and furnishing and fitting frames. Under these agreements the City Optical Company paid to the physician in each case one third of the amount it charged his patient for the services performed by the optical company. The patient was not required by the physician to go to a particular optical company. The relation between the patient and the physician was such that the patient would accept the suggestion made by the physician. No information was volunteered to the patient that payment was to be made by the optical company to the physician of any portion of the amount paid by him to the optical company for the service there rendered. If a patient asked whether any portion of his payment to the optical [fol. 178] company would be paid over to the physician he was told, but this occurred very rarely.

Patients were directed by the physician that when their glasses were made and fitted by the optical company to bring them back to the physician for him to check the quality and accuracy of the work done by the optical company and to see if they had been properly fitted. The work to be done by the physician on return to him by the patient might include a re-examination of the eyes of the patient if such was required. All of these services to be rendered later by the physician were included in the charge made the patient by the physician and accordingly no additional charge was made for this service whether the patient had the prescription filled by an optical company with which the physician had a so-called "kickback" agreement or an optical company with which the physician had no such agreement. The patient in practically every instance was unaware of the fact that his physician was receiving from the optical company a portion of his payment made to that company. No witness who was asked knew of any specific canon of ethics of the various medical societies or associations forbidding this practice of oculists accepting so-called "kick-

backs" from optical companies, but the practice was frowned upon and considered unethical by the medical profession as a whole. Although it had been condemned by the Medical Society of North Carolina, no direct action had been taken by that society against any individual physician. One of the optical companies in Greensboro, North Carolina, a competitor of the City Optical Company, ceased its practice of paying these commissions or "kickbacks" to oculists [fol. 170] subsequent to the taxable years and prior to the hearings of these proceedings.

In some cases oculist physicians did their own "dispensing," that is, they not only measured the vision and prescribed the lenses, but sent the prescription to some optical company for the grinding and fitting of the lenses to the type of frame selected by the patient, the measurements for which had been taken by the physician. On the return to the physician of the fitted lenses, these were adjusted by the physician to the patient and a total charge made for the entire service. In these cases the practice was for the physician to charge his patient the fee for the service rendered and the retail price of the lenses and frames furnished by the optical company. The physician was then billed by and paid the optical company at the lower wholesale rate for the lenses and frame. The several state medical associations and the American Medical Association have by their canons of ethics condemned the "splitting of fees" between physicians.

The same agreement as to "trade discounts" was made and carried out under similar circumstances by the Duke Optical Company for 1943 and 1944. "Trade discounts" allowed oculist physicians by the City Optical Company for the three years in question were as follows:

1942	\$57,063.45
1943	61,601.95
1944	60,021.65

"Trade discounts" allowed oculist physicians by Duke Optical Company for 1943 were \$6,568.87; and for 1944 were \$4,798.35.

[fol. 180]

OPINION

LEECH, Judge:

The fourth issue presents the correctness of the disallowance of deductions of certain so-called "trade discounts" in computing the income of the City Optical Company and the Duke Optical Company. All of these items in each year were composed of payments made by these companies to various physicians who were oculists. These payments constituted one third of the amount these optical businesses charged customers for the grinding of lenses and the fitting of eyeglasses under prescriptions issued by those doctors. The circumstances with respect to such payments are set out in our findings of fact.

These payments for each of the taxable years have been disallowed by the respondent on the grounds that such payments were made under contracts which were void and unenforceable as against public policy and consequently are not deductible as ordinary and necessary expenses.

If the payments which are the subject of the present controversy were merely remotely connected with contracts violating public policy—such as fees of attorneys paid in litigation brought to determine the question of that violation—then such payments are deductible. But if these payments were directly connected with contracts contravening the alleged public policy here—payments or the promise to make which were the very consideration for such contracts—they are not deductible as ordinary and necessary expenses. *Commissioner v. Heininger*, 320 U. S. 467, and cases cited therein. No question is and we think none could [fol. 181] reasonably be raised here but that the payments involved were directly connected with the contracts between the physicians and the opticians, petitioners. Petitioners' position is simply that no public policy was violated by these contracts.

Here an individual who is suffering from eye trouble employs an oculist to render professional services in the relief of that trouble. Implicit in this contract is the provision that the physician shall use his full ability and professional skill toward the patient. *Ballou v. Prescott*, 64

me. 305. These services include an examination and, if necessary, treatment, such as the use of glasses as prescribed by the doctor. To the patient the oculist stands in a position of the highest trust and confidence, and his advice and suggestions are customarily followed because of this status. The oculist examines the patient's eyes, measures the vision and writes a prescription for the grinding of the necessary lenses to correct the defect in sight. For this the oculist makes a charge, payment of which meets the only obligation of the patient to the oculist for the services rendered to him by the oculist, including the later service of an inspection of the quality of work in the glasses, a check of them by the oculist against his prescription and causing their return to the optician for correction where necessary without additional charge by the optician.

The oculist recommends or suggests to the patient that the prescription be taken to one or more designated opticians for the work of grinding the lenses in accordance with the prescription and furnishing and fitting frames therefor. The patient is not required to go to such opticians, but in the vast majority of cases he takes the advice or suggestion [fol. 182] of the physician, oculist, because of his trust and confidence in him.

The evidence is that certain oculists had an arrangement or understanding with the City Optical Company and the Duke Optical Company, to whom they directed their patients, that a substantial portion of the charge exacted from the patient for work done by these opticians be remitted to such oculists. The amount of the charge remitted to the oculist by the opticians here was one third of the amount paid by the patient to the optician for services rendered to the patient by the optician, which the patient employed.

Explanations by various oculists who testified in this proceeding and by officers and employees of the City Optical Company, as tending to justify the propriety of this arrangement, are anything but convincing. By some, it was stated that the optician was considered as an agent or employee of the oculist. There is, of course, no sound or even reasonable basis for such statement. The particular optician was selected by the patient, who was free to make any selection.

Others testified that the amount of the "kickback" to the oculist was his additional compensation from the optician for examining the glasses, if the patient returns to him, to learn whether the prescription has been properly filled and to cause the glasses to be returned to the optician for correction without further charge by him. Such service by the oculist, however, is included in that for which he has been paid by his patient and is performed by the oculist in all cases if requested by the patient, whether the prescription for glasses has been filled by the optician with whom the oculist has an arrangement for division of fees or one with [fol. 183] whom no such arrangement exists.

A third explanation offered was that, in the absence of such an arrangement, an oculist might "dispense" the glasses for which he prescribed lenses. In such circumstances the oculist would not only prescribe the lenses but would have the patient select the type of frames he desired, measure his face for the size of frame necessary, and order the complete glasses, including the ground lenses fitted into the frames, from some optician employed by this oculist. He would then make an aggregate charge to the patient covering the prescription, glasses, and a charge for fitting them when returned by the optician. It was testified that, under those circumstances, it was customary for the oculist to charge his patient a retail price for the ground lenses and frames, while he paid the optician the wholesale price thus making an additional profit over and above that included in his charge for his prescription.

It is explained that the surrender by the oculist of the profit he would thus make, if he personally bought the lenses and frames and fitted the glasses, is the consideration for and entitles him to receive a portion of the profit derived by the optician for that service. This explanation is also without basis in fact. The employment by the patient, of an optician to perform the service in question relieves the oculist not only of the work of fitting and adjusting glasses but also the burden of financing their manufacture and thus eliminates the possibility of loss to the oculist through the patient's failing to pay for the glasses.

~~Are these practices against public policy?~~

Public policy is defined as the public good. Everything [fol. 184] that tends clearly to undermine that sense of

security of individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608; 63 Atl. 70; *Goodyear v. Brown*, 155 Pa. 514; 26 Atl. 665; *Russell v. Courier Printing & Publishing Co.*, 43 Colo. 321; 95 P. 936; *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 82 Md. 535; 34 Atl. 778. As the court said in *Elzey v. Ajax Heating Co.*, 10 N. J. Misc. Rep. 281; 158 Atl. 851:

Contracts, the objects of which are regarded by common law as contrary to "public policy," are unenforceable at law.

"Public policy" has been defined as being that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

Thus a contract between a layman and a lawyer by which the former agrees, in consideration of a division of fees received by the latter, to seek and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void. *Holland v. Sheehan*, 108 Minn. 362; 122 N. W. 1.

It has been held that public policy is the community common sense and common conscience extended and applied throughout the state to matters of public morals, it is that general and well settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard [fol. 185] to all the circumstances of each particular relation and situation. *Pittsburgh, C. C. & St. L. Ry. Co. v. Kinney*, 95 Ohio St. 64; 115 N. E. 505.

It has also been said that many things which the law does not prohibit in the sense of attaching penalties to punish their commission can not be admitted as the subject of a valid contract if they are so mischievous in their nature that to permit them to be the subject matter of a contract would be violative of public policy under the principle that one can lawfully do that which has a tendency to be injurious to the public welfare. *Gordon*

v. *Gordon's Administrator*, 168 Ky. 409; 182 S. W. 220; *Bankers Bond Co. v. Buckingham*, 265 Ky. 712; 97 S. W. (2d) 596.

Petitioners argue that since there is no constitutional or statutory provision, State or Federal, and no canon of ethics of a medical association specifically condemning this "kickback" practice by opticians to oculists—no public policy exists proscribing such practice and therefore none is violated.

True, we have found no such constitutional or statutory provision. All the witnesses who were asked the question denied knowledge of any condemnatory specific canon of ethics although the practice had been criticized and condemned at meetings of the medical associations and in their professional publications. But is that the answer? We think not.

The absence of constitutional or statutory law or rules of professional conduct condemning this particular practice is not enough to support petitioners' position. Decisions of the courts can and do evidence public policy. *Vidal v. Girard's Executors*, 2 Howard 127. The rule of law which the contracts between the oculists and the petitioners [fol. 186] violate has long ago become a fixture in the law by innumerable decisions which supply the "definite indications in the law of the sovereignty" justifying the invalidation of these contracts as contrary to the policy thus indicated. See *Muscheng v. United States*, 324 U. S. 49. That rule of law is that one can not, at the same time, serve two incompatible masters. And actual damage is not a condition precedent to the application of the rule. Judge Lurten, while speaking for the United States Court of Appeals for the Sixth Circuit in *City of Findlay v. Peritz*, 66 Fed. at page 424, stated the rule as follows:

Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principles of reason and morality, and has been sanctioned by the

courts in innumerable cases. "It has its foundation in the very constitution of our nature," says Judge Dillon, "for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails." 1 Dill. Mun. Corp. §444. "An agent cannot be allowed to put himself in a position in which his interest and his duty will be in conflict." Leake, *Cont.* (3d Ed.) 409. The tendency of such agreement is to corrupt the fidelity of the agent, and is a fraud upon his principal, and is not enforceable, "even though it does not induce the agent to act corruptly." "It would be most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer [fol. 187] was not damaged." Wald's *Pol. Cont.* 245, 246, note, citng *Harrington v. Dock Co.*, 3 Q.B. Div. 549, and other cases. *Taussig v. Hart*, 58 N. Y. 425; *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450-460; *Smith v. Sorby*, 3 Q.B. Div. 552; *Young v. Hughes*, 32 N. J. Eq. 372; *Yeoman v. Lasley*, 40 Ohio St. 190. • • •

Other judicial expressions of the rule are:

One employed by another to transact business for him, has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith toward his employer. • • • His compensation could be increased by such conduct, and it is no answer, that nothing of the kind occurred. [*Atlee v. Fink*, 75 Mo. 100]

One who is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself. Such transactions are against the policy of the law. [*Rezos v. Zahm & Nagel Co.*, 78 Cal. App. 728, 246 Pac. 564, 565]

It makes no difference that such common agent was guilty of no actual wrong. The courts refuse to conn-

tenance such an employment, not for the sake of the principals, but for the sake of the law. [*Chapman v. Currie*, 51 Mo. App. 40.]

It is immaterial that the plaintiff acted in good faith, or that the defendant suffered no damage. It is the policy of the law to remove all temptation in an agent to be influenced by his own interest to the detriment of his principal. [*Humphrey v. Eddy Transportation Co.*, 107 Mich. 163; 65 N. W. 13]

[fol. 188] See also *Oscanyan v. Arms Company*, 103 U. S. 261; *Tool Company v. Norris*, 2 Wall. 45; *Easton Tractor & Equipment Co.*, 35 B.T.A. 189; *Quinn v. Burton*, 195 Mass. 277; 81 N. E. 257; *Smith v. David B. Crockett Co.*, 85 Conn. 282, 82 Atl. 569; *Jensen v. Bowen*, 37 N. D. 352, 164 N. W. 4.

This rule has been recognized and applied by this Court. Not only is that true, but it has been extended to cover a case where the proscribed contract was made not by the principal with the agent or employee of another principal—but by one principal with an intimate friend and associate of the agent or employee of the other. Thus in *Easton Tractor & Equipment Co., Inc.*, *supra*, the petitioner sought to deduct, as ordinary and necessary expenses of its business of selling road equipment, commissions paid to a person, not a public official, who was a friend and associate of members of the State Highway Commission, who were agents and employees of the State in the purchasing of such equipment. We denied the deduction on the ground that the contract under which it was paid was against public policy.

In this case, as in others cited, the agent or employee involved was that of a government or its instrumentality. But the rule is applied generally to situations where the parties are private individuals or corporations. *Maryland Trust Co. v. National Mechanics' Bank*, *supra*; *Wolfe v. International Re-Insurance Corp.*, 73 Fed. (2d) 267; certiorari denied, 294 U. S. 725. See also *United States v. Carter*, 217 U. S. 286.

¹ In neither the Wolfe nor Beekman case did the decision rest on the violation of any statute.

In the *Wolfe* case the plaintiff, a public accountant, was [fol. 189] employed by both the United States Casualty Company and the defendant corporation to make their annual audits. In connection with this audit of the United States Casualty Company he called attention of its president to the amount of its outstanding risks as being too high and recommended the reinsurance of a portion of them with the defendant. Unknown to United States Casualty Company, Wolfe had an agreement with the defendant for the latter to pay him a commission on all business United States Casualty Company should reinsure with it. Wolfe drafted for the latter company a reinsurance contract and participated in the conference between the two companies as a result of which it was adopted. In holding the contract between Wolfe and defendant void and unenforceable, Judge Learned Hand, for the Circuit Court of Appeals for the Second Circuit, said the contract "made impossible that unmixed allegiance on which the law insists."

In *Reilly v. Beekman*, 24 Fed. (2d) 791, the facts were these. Reilly was an accepted business and financial adviser to one Mrs. Trenkman, and as such occupied a position of trust and confidence. Mrs. Trenkman had a business matter involving her father's estate and Reilly advised her to employ Beekman, a lawyer, to represent her. Reilly introduced Beekman to her, as a result of which Beekman was employed. Unknown to Mrs. Trenkman, Reilly had an agreement with Beekman under which he was to receive 50 per cent of any fee received by Beekman on business which Reilly might be able to direct to him. Beekman received from Mrs. Trenkman a fee of \$600,000 for his services to her. Reilly sued Beekman for the percentage due him under their contract. In denying relief on the ground [fol. 190] that the contract between Reilly and Beekman was void as against public policy, the Second Circuit, speaking through Judge Augustus N. Hand, said:

It cannot be disputed that, if Reilly was in a fiduciary relation to Mrs. Trenkman when he recommended Beekman to her as an attorney, he could not agree to profit from the business arising out of the introduction without her knowledge and consent. This is because Mrs. Trenkman was entitled to his disinterested advice.

as to the attorney to be recommended to her. That advice was not likely to be disinterested, if affected by the consideration of whether or not he could make a profit out of the recommendation of a particular person. Moreover, she was entitled to have him recommend an attorney, the amount of whose fees would depend on the services he had to perform, and would not be affected by what he had to pay out to the plaintiff for an introduction to the client. * * *

The court said further:

* * * If, as is contended, Reilly was not acting in an ordinary sense as an agent for Mrs. Trenkman in respect to her business and financial affairs, and simply as a friend recommended a lawyer, when requested so to do, we think he stands in no better position. To be sure, in that case he would be only a volunteer, but if he offered merely as a friend to recommend an attorney, with no knowledge on her part that he was to derive any benefit from the recommendation, she was deprived of the disinterested advice which he assumed to give when he was *under the pay of Beekman in making the recommendation.*

* * * In such circumstances the law regards the contract on which recovery is sought as unenforceable, because *against public policy.* * * * [Italics supplied.]

[fol. 191] It is not contended by the petitioners, nor did any witness testify, that the aggregate fees of the oculist and the optician or even the cost of glasses to a patient was less or no more under the above "kickback" arrangement than it would have been in its absence. It is clear to us that the practice tended to increase that cost. The oculist of course knew of his contract with the optician when each patient was examined. The patient, in practically all cases, knew nothing of the arrangement. Thus, the oculist, in a relationship of great trust and confidence with respect to the patient, is subjected to the temptation of prescribing glasses where not actually necessary, or more expensive lenses than those really needed.

It may be argued, however, that such rule is not applicable on the present facts for the reason that the contract of em-

ployment between the oculists and their patients ceased with the issuance of the prescription for glasses to the patient and therefore did not include any recommendation of an optician by the oculist. We disagree.

The patient employed the physician, oculist, to use his full professional care, ability and skill in attempting to cure or relieve the patient's eye trouble. *Ballou v. Prescott, supra*. Under the express terms of this contract these services did not terminate until *after* the patient received his glasses from the optician when, if requested by the patient, the doctor was required to inspect and check them against his prescription. Thus, we think, the contract of the doctor with the patient included the full use of his professional skill, ability and care in providing a proper grinding of the necessary lenses as prescribed by the doctor which, in turn, comprehended—at least when made as here—recommendations as to the optician the patient should [fol. 192] employ. See *Reilly v. Beekman, supra*; *Schmit v. Esser*, 183 Minn. 354; 236 N. W. 622. To the same effect are *Gillette v. Tucker*, 67 Ohio St. 106; 65 N. E. 865; *Nash v. Royster*, 189 N. C. 408; 127 S. E. 356.

Although the pertinent rule or policy of the law, as has been stated, is a fixture in the law, we have found no case where it has been applied to the present facts. This is understandable. The two apparent ways in which the question could arise on these facts would be where a physician was suing on such a contract or where, as here, the optician attempts to deduct his payments under such contract as ordinary and necessary expenses of his business for tax purposes. In the first case it is improbable that any sensible doctor would sue and thus allow the attendant publicity of his lack of professional honesty to lose him more than the money involved. In the latter case, if the payments by the opticians to the doctors were camouflaged as here, under the inaccurate designation of "trade discounts," it would be at least difficult for the tax collecting agency to discover such payments.

Nevertheless, we think the answer is clear. So far as this record reveals, all the contracts under which these "kickbacks" were paid were made by petitioners with physicians. We think petitioners knew that fact and realized the very high degree of trust and confidence ex-

isting between those doctors and their patients. We think petitioners realized that because of that relationship the patients would follow the recommendation of the optician by the doctor, as they did, and that these considerations were what inspired the petitioners, opticians, to make these contracts and the payments, the deduction of which is in controversy. It may be noted further that these contracts were oral—so far as here disclosed; that [fol. 193] the payments to some of the oculists were made in cash at their request and, significantly, all such payments were recorded in the books of petitioners under an account labeled "trade discounts"—an account which obviously, to say the least, did not correctly describe them. To which may still be added the fact that one of the two opticians in Greensboro, North Carolina, where this case was heard, has ceased this "kickback" practice since the tax years involved here.

If we accept the contract between the doctor and the optician on its face, it would seem that the payments thereunder to the doctor were merely commissions on the sale of lenses and frames of the optician to the patient of the doctor. On this basis the doctor, unknown to the patient, is accepting a payment from the optician for recommending the optician—a service which is included in the employment of the doctor by the patient and for which the doctor has been paid by the patient. But some of the doctors testifying insisted the payments they received from the opticians, unknown to the patient, were additional compensation for the services to be rendered to their patients in checking and inspecting the glasses after their delivery to the patients. It is not disputed, however, that this check and inspection of the glasses purchased from the optician on the recommendation of the doctor were included in the employment of the doctor by the patient for which the patient had paid the doctor. Nor is it to be questioned that, under his contract of employment by the patient, it was the duty of the doctor, where necessary—*after* this inspection of the glasses—to direct their return for correction to the optician whose contract with the patient required the optician to do this additional work on the glasses without additional charge.

Thus under either premise—and approaching the question from the viewpoint of either the physician or the optician—the contracts between them violated the rule of public policy above discussed. *Wolfe v. International Re-insurance Corp.*, *supra*; *Reilly v. Beckman*, *supra*; *Easton Tractor & Equipment Co. Inc.*, *supra*; *Kelley-Dempsey & Co.*, 31 B. T. A. 351. In the last cited case a contractor doing work for a principal agreed to pay agents of that principal who were employed in inspecting and approving the work to see that the contractor received that to which he was entitled under the contract. In that case there was no indication that the principal was actually defrauded or that the inspection was other than honest and fair. No indication of any intention to corrupt the agent and induce him to approve work improperly done appears. There, however, we characterized such a payment as one by which the contractor "greased some palms," and denied the deduction of the payments thus made by the contractor as not ordinary and necessary business expenses.

It is true that the evidence in this case is that the practice questioned here was more prevalent than that condemned in the *Kelley-Dempsey* case. But the fact that more people "greased [more] palms" here than in the *Kelley-Dempsey* case, whatever its other effects are, surely does not make of such practice anything other than a greasing of palms. We continue to hold, as we did in the *Kelley-Dempsey* case, that

• • • to encourage the accession to demands of this sort, both morally and legally wrongful, by straining the common meaning of the words of the statute to permit such payments to be deducted as ordinary [fol. 195] and necessary expenses of operating a business would be poor public policy. This Board and the Courts have consistently refused to do so with respect to expenditures occasioned by somewhat comparable causes.²

[Footnote 2—citing cases]

It must be remembered that the fundamental principle with which we are dealing here is not that of the relationship between the parties to an ordinary commercial trans-

action. We are concerned in this case with the relationship between physicians and their patients. There can be no doubt of the exceedingly high degree of confidence and trust inherent in that relationship.

As the court in a recent exhaustive and illuminative discussion of that relationship said in *Bartron v. Codington County*, 68 S. D. 309, 2 N. W. (2d) 337:

These professions, as they exist in our social structure, rest upon a foundation of sturdy, sterling human character which, in turn, has been and is being shaped and moulded by the impact of traditional ideals and points of view. The licensing statutes with their emphasis on character and professional conduct evidence a fixed public desire and will not only to foster, but to develop and reinforce, these basic attributes of its professional servants. The constant trend of public demand, as exhibited by these licensing statutes, is for mounting standards, a more painstaking investigation of the character and professional conduct of applicants for entrance into those regulated fields, and a more constant vigilance in observing the conduct of those to whom the privilege of practice has been granted. Manifestly, that which has a tendency to blight the character or lower the standards of the business or professional practice of these individuals would be in contravention of the public aspirations so [fol. 196] clearly reflected in the licensing statutes. Thus we conclude that debasement of the professions is not only inimical to public welfare in fact, but is in contravention of an established and fixed community want.

It may be argued that the result of this conclusion is to penalize the opticians who make the payments which are the subject of this controversy—and leave untouched the doctors who receive them and whose professional ethics are involved. This may be the fact. But the opticians are, as has been fully demonstrated, far from blameless. If the present contracts between the petitioners, opticians, and the doctors are void as against public policy, then payments made under these contracts, regardless by

which party thereto, are not deductible as ordinary and necessary expenses. Cf. *Wolfe v. International Re-Insurance Corp.*, *supra*; *Reilly v. Beekman*, *supra*; *Easton Tractor & Equipment Co., Inc.*, *supra*; *Kelley-Dempsey & Co.*, *supra*.

We conclude that the payments under the contracts between the two optical businesses, composed of petitioners, and the oculists are not deductible as ordinary and necessary expenses because the contracts under which these payments were made violated public policy.

Reviewed by the Court.

Decisions will be entered under Rule 50.

ARUNDELL, J., dissenting:

I am disturbed by the holding in the majority opinion that a commission (characterized as a "kickback") paid by an optician to a doctor for sending him customers may not be deducted as an ordinary and necessary expense on [fol. 197] the ground that this practice of the doctors is unethical and contrary to public policy. The question seems to be one of first impression.

The revenue statutes are designed to raise money to support the Government and as stated by Judge Sibley in *Alexandria Gravel Co. v. Commissioner*, 95 Fed. (2) 615, they are none too squeamish about how the income to be taxed was realized. The profits of illegal businesses are taxed the same as the profits of legitimate businesses and as the tax is based on net income rather than gross income, the expenses incurred in carrying on of the illegal business have been generally allowed, as the purpose of the tax laws is not to penalize a business because it is one on which the law frowns. *Commissioner v. Heininger*, 320 U. S. 487. It is true that courts have balked at permitting the deduction of sums paid as bribes and sums paid to perform an act specifically forbidden by law, but those holdings were based on the finding that such expendi-

tures could not be characterized as "ordinary" or "necessary" in the carrying on of a trade or business.

Our income tax system is what is commonly called a self-assessing one and the deductions to be allowed are the ones spelled out by Congress. Expenditures incident to the earning of the income are, generally speaking, deductible in determining the income to be taxed. As I understand the holding of the majority, it is that what would be normally regarded as an ordinary and necessary expense may not be deducted in this case because the arrangements incident to the payment are said to be contrary to public policy.

There are many definitions of what is public policy, and *Words and Phrases*, Vol. 35, pp. 274-291, contains hundreds of excerpts from court decisions defining the [fol. 198] term and some of the definitions as quoted in the majority opinion are to be found in this work. In *Vidal, et al. v. Girard's Executors*, 2 How. 126, 197, where certain conditions which had been attached by a testator to a devise for the establishment of a college were challenged as being violative of the public policy of Pennsylvania, the Supreme Court held:

In considering this objection, the court are [sic] not at liberty to travel out of the record * * * to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, * * *. We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws, and decisions necessarily bring before us.

More recently, in *Muschany v. United States*, 324 U. S. 49, 66, the Supreme Court has stated:

Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal v. Philadelphia*, 2 How. 127, 197-98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.

[fol. 199] It would seem to me that the Tax Court should be reluctant to undertake the determination of the question of what is and what is not contrary to public policy, both for the United States and for each of the 48 states, where the act condemned as against public policy is not one shown to be violation of any law of the land. What are deductible items should be known to a taxpayer with reasonable certainty under our income tax system. This Court in the past has taken the position that it does not possess the right to condemn undesirable trade practices as being against public policy where it could find no expression of statutory law or other authority to that effect. See *F. L. Bateman*, 34 B.T.A. 351.

It is interesting to note that the Commissioner in his Regulations does not point out that expenditures of this sort fall *without* the purview of the statute, and in his brief in this case he does not argue that the agreements between petitioner and the doctors were contrary to public policy, but, rather, that the payments to the doctors are not ordinary and necessary expenses in that they were voluntary and incident to an unethical practice.

DECISIONS

Docket No. 18881:

This proceeding came on to be heard at Washington, D. C., July 27, 1950, under Rule 50, both parties having filed recomputations of the deficiencies upon the basis of the ~~opinion of this Court promulgated June 6, 1950, these computations not being in agreement.~~

Upon examination of the recomputation prepared by each party and upon careful consideration of the explana-

tion and arguments of counsel, it is determined that the [fols. 200-201] recomputation as made by the respondent is correct. It is, accordingly,

Ordered and decided that there are deficiencies in income tax due from the petitioner for the years and in the amounts as follows:

Year	Deficiency
1943	\$54,953.67
1944	19,301.68

(S.) J. Russell Leech, Judge

Entered Sep. 6, 1950.

Docket No. 18882:

Pursuant* to the findings of fact and opinion of the Court promulgated in the above-entitled proceeding on June 6, 1950, the petitioner filed on July 7, 1950, her proposed computation, and respondent filed on July 21, 1950, his proposed computation herein, which computations are in agreement. It is therefore,

Ordered and decided: That there are deficiencies in income tax for the years 1943 and 1944 in the amounts of \$26,685.29 and \$23,167.14, respectively.

(S.) J. Russell Leech, Judge.

Entered July 24, 1950.

* As corrected by order dated July 26, 1950.

[fol. 202] APPENDIX "B" TO RESPONDENT'S BRIEF

RESPONDENT'S EXHIBIT T

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 46C1333

UNITED STATES OF AMERICA, Plaintiff

AMERICAN OPTICAL COMPANY, an Association; AMERICAN OPTICAL COMPANY, a Corporation; Noah Fox; G. H. Mundt; A. J. Blickenstaff; Steve A. O'Brier; Loran M. Martin; Herman C. Kluever; Charles H. Coughlin; Frank C. Boggs; M. E. Brownell; W. O. Quiring; J. D. Woolworth; N. T. Simmonds; E. J. Cufran; Joseph S. Summers; William Orlando Smith; John J. Crume; Frederic J. Crumley; Bernard B. Friedman; Fred R. Landon; H. J. Heeb; Reinhold O. Ebert; Erwin W. Newman, Defendants

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and upon information and belief alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U. S. C. 4), as amended, said Act being commonly known as the Sherman Antitrust Act, against the defendants named herein, in order to prevent and restrain violations by them of Section 1 (15 U. S. C. 1) of the said Act.

2. The defendant corporation, American Optical Company, transacts business within the Northern District of Illinois, Eastern Division, and is found therein.

DEFENDANTS

Corporations and Associations

3. American Optical Company, named herein as defendant, is a voluntary association organized under the laws of the State of Massachusetts and has its principal place of business at Southbridge, Massachusetts.

4. American Optical Company, named herein as defendant, is a corporation organized under the laws of the State of Massachusetts and has its principal place of business at Southbridge, Massachusetts, in the same buildings used and occupied by the American Optical Company (an association). The defendant corporation is a wholly owned and controlled subsidiary of American Optical Company (an association) and was organized by the said defendant association to distribute ophthalmic goods in States having statutory restrictions as to voluntary associations of the type permitted under the laws of the State of Massachusetts.

5. Whenever herein the term "defendant American" is used, it shall be understood to refer to American Optical Company, the association and the corporation.

Class Defendants

6. The following individuals and the class of persons to which they belong are named as defendants. The individuals designated as defendants are fairly and adequately representative of a class of persons so numerous as to make it impracticable to bring all of them before the court; and against whose members the character of right sought to be enforced is several, and there are common questions of law and fact affecting their several rights and a common relief is sought against all the members of the class:

Name:

Address:

Noah Fox, M.D., 841 East 63rd St., Chicago, Illinois.

C. H. Mowatt, M.D., 20 North Michigan Avenue, Chicago, Illinois.

A. J. Blickenstaff, M.D., Alliance Life Bldg., Peoria, Illinois.

Name:	Address:
Steve A. O'Brien, M.D.,	First National Bank Bldg., Mason City, Iowa.
[fol. 204] Loran M. Martin, M.D.,	711 Carver Bldg., Fort Dodge, Iowa.
Herman C. Kluever, M.D.,	711 Carver Bldg., Fort Dodge, Iowa.
Chas. H. Coughlin, M.D.,	711 Carver Bldg., Fort Dodge, Iowa.
Frank C. Boggs, M.D.,	600 Mills Bldg., Topeka, Kansas.
M. E. Brownell, M.D.,	1025 First National Bank Bldg., Wichita, Kansas.
W. O. Quiring, M.D., c/o Gage Hall Clinic,	Hutchinson, Kansas.
J. D. Woolworth, M.D.,	1514 Slattery Bldg., Shreveport, Louisiana.
N. T. Simmonds, M.D.,	1240 Jackson St., Alexandria, Louisiana.
E. J. Curran, M.D.,	1805 Federal Reserve Bldg., Kansas City, Missouri.
Joseph S. Summers, M.D.,	234 Madison St., Jefferson City, Missouri.
Wm. Orlando Smith, M.D.,	203 Philcade Bldg., Tulsa, Oklahoma.
John J. Crume, M.D.,	Fisk Bldg., Amarillo, Texas.
Frederic J. Crumley, M.D.,	Fisk Bidg., Amarillo, Texas.
Berhard B. Friedman, M.D.,	916 Jones Bldg., Corpus Christi, Texas.
Fred R. Landon, M.D.,	Hamilton Bldg., Wichita Falls, Texas.
H. J. Heeb, M.D.,	813 West Wisconsin Ave., Milwaukee, Wisconsin.
Reinhold O. Ebert, M.D.,	64 Mount Vernon St., Oshkosh, Wisconsin.
Erwin W. Newman, M.D.,	1606 Capitol Ave., Cheyenne, Wyoming.

7. The class of persons made defendants herein, of whom the foregoing individual defendants are members and are fairly and adequately representative, have the following things in common:

(a) All are physicians (commonly known as oculists) who specialize in the science of the eye and its diseases;

- (b) All, in their professional capacity, regularly make ophthalmic refractions for their patients, and on the basis of such refractions prescribe ophthalmic lenses for the patients' eyes;
- (c) All regularly charge patients a professional fee for making ophthalmic refractions and for prescribing the type and power of ophthalmic lenses needed;
- (d) All refer patients to or have patients who take their prescriptions for ophthalmic lenses to a dispensing branch of defendant American to purchase spectacles or parts thereof as prescribed;
- (e) All receive and accept from defendant American rebates or "credits" of part of the purchase price paid by patients for spectacles and parts thereof.

8. The defendant American, through its dispensing branches, fills prescriptions for patients of upward to three [fol. 205] thousand oculists in the foregoing class, with each of such oculists receiving and accepting rebates or "credits" from the defendant American on account of ophthalmic goods sold to the patients of such doctors.

III.

DEFINITIONS

9. "Oculist." This term when used in this complaint applies to physicians (M. D.'s) specializing in the science of the eye and its diseases. Doctors who have had advanced training in this field are professionally known as ophthalmologists. Oculists in their professional capacity make ophthalmic refractions (commonly known as eye examinations) for their patients and prescribe ophthalmic lenses to correct deficiencies in vision.

10. "Optometrist." This term when used in this complaint applies to persons who are not physicians (M. D.'s) but who are licensed by the States to examine human eyes, make ophthalmic refractions and prescribe ophthalmic lenses to correct deficiencies in vision.

11. "Wholesaler." This term when used in this complaint applies to a person, company, or branch thereof, in the optical supply business, who maintains a stock of lenses, blanks, semi-finished lenses, frames, mountings, and other

parts needed for use in making complete spectacles or repairing spectacles, together with machinery and equipment for grinding, polishing, edging, beveling, and mounting lenses, and who sells such ophthalmic goods to oculists and optometrists and opticians on a "stock," "Rx," or "prescription" basis. Many of such wholesalers sell spectacles or parts thereof directly, on prescription from oculists or optometrists, to their patients.

12. "Retail Optician." This term when used in this complaint applies to any person or company who maintains a stock of lenses, blanks, semi-finished lenses, frames, mountings, and other parts needed for use in making complete spectacles or repairing spectacles, together with machinery and equipment for grinding, polishing, edging, beveling, and mounting lenses, and who sells spectacles and parts thereof on prescription to the patients of oculists, but does not make a practice of making Rx, or prescription sales to oculists or optometrists. Retail opticians who are members of the "Guild of Prescription Opticians of America, Inc.," and are commonly known as "Guild opticians" are pledged by their code of ethics to give no rebates or "credits" to doctors of any part of the purchase price paid by their patients to such Guild opticians for spectacles or parts thereof.

13. "Stock Sales." This term when used in this complaint applies to bulk or quantity sales of ophthalmic goods such as lenses, frames, mountings, and other parts used in making a complete pair of spectacles, by wholesalers to oculists, optometrists, and retail opticians. Most of such sales are made by wholesalers to those who have the equipment and skill or trained personnel needed for grinding, polishing, edging, beveling, drilling, and mounting lenses.

14. "Stock Prices." This term when used in this complaint applies to the range of wholesale prices charged by wholesalers for the different quantity categories which they set forth for stock sales of ophthalmic goods. These stock prices are the lowest in the category of wholesale prices charged by wholesalers.

15. "Rx" or "Prescription Sales." Either of these terms when used in this complaint applies to sales made by wholesalers to oculists and optometrists on their prescriptions of single units (or pairs when the unit is in that

form) of ophthalmic goods. The term when applied to lenses refers to those which have been ground to the power specified by the prescription and otherwise prepared and ready for mounting or actually mounted.

16. "Rx" or, "Prescription Prices." Either of these terms when used in this complaint applies to the prices charged by wholesalers to oculists and optometrists on Rx or prescription sales. These terms when applied to [fol. 207] ophthalmic lenses cover the prices for such lenses ground to the prescribed powers and otherwise completed and ready for mounting or actually mounted. The Rx or prescription price on a completed pair of spectacles is arrived at by adding the Rx or prescription price of the prescribed lenses, ready for mounting or mounted, to the Rx or prescription price of the mountings used with these lenses to make the complete pair of spectacles. Rx or prescription prices are the highest in the range of prices charged by the wholesaler to oculists and optometrists.

17. "Dispensing." This term when used in this complaint applies to the sale to a patient of the prescribed glasses, parts, or repairs, the sale usually involving fitting and adjusting the glasses to the patient's face.

18. "Wholesale Dispensing." This term when used in this complaint applies to the dispensing by wholesalers directly to patients of oculists, on prescriptions, of spectacles and parts thereof, including single lenses or pairs of lenses prescribed to repair broken lenses or replace lenses. Wholesale dispensing, as practiced by the defendants, will be more fully described hereinafter.

IV

Trade and Commerce

19. The defendant American manufactures a full line of ophthalmic goods consisting of ophthalmic lenses in blank, semi-finished and finished form, frames, mountings, and other parts for complete spectacles in its factories located in Southbridge, Massachusetts, and other places. It is one of the two largest manufacturers of ophthalmic goods in the United States. The defendant American ships ophthalmic goods manufactured by it to its wholesaling branches, including those branches located in States other

than the States in which the ophthalmic goods are manufactured. The defendant American operates approximately 254 of such wholesaling branches distributed as follows in the designated States, the District of Columbia, and the Territory of Hawaii:

California	20	Maine	4
New York	20	New Jersey	4
Texas	20	West Virginia	4
Massachusetts	12	Virginia	4
Illinois	10	South Carolina	3
Iowa	10	Kentucky	3
Missouri	10	Arkansas	3
Ohio	10	Mississippi	3
Pennsylvania	8	Montana	3
Florida	8	Idaho	3
North Carolina	7	Minnesota	2
Tennessee	6	Utah	2
Indiana	6	South Dakota	2
Washington	6	Arizona	2
Louisiana	6	Wyoming	1
Wisconsin	5	New Mexico	1
Kansas	5	Nevada	1
Connecticut	5	Vermont	1
Alabama	4	Rhode Island	1
Georgia	4	New Hampshire	1
Michigan	4	Maryland	1
Nebraska	4	Delaware	1
Oklahoma	4	District of Columbia	1
Colorado	4	Hawaii	1
Oregon	4		

The defendant American also sells and ships ophthalmic goods to wholesalers located throughout the United States.

20. The defendant American, through its wholesaling branches, is one of the two largest wholesalers of ophthalmic goods in the United States. The branches of the defendant American operate as wholesalers of ophthalmic goods manufactured by the defendant American, as well as for some items manufactured by companies other than the defendant American, and which are shipped in interstate trade and commerce to such branches of the defendant American.

21. A large portion of the business done by the branches of the defendant American consists in making Rx or prescription sales of ophthalmic goods to optometrists. A much smaller volume of prescription sales is made to oculists.

[fol. 209] 22. Most optometrists do their own dispensing of glasses for their patients, usually charge no separate fees for making ophthalmic refractions, and therefore make their profits from the sale of the spectacles or parts thereof to their patients. It is not economically feasible for most optometrists or oculists to maintain a large stock of lenses, frames, mountings, and other parts for spectacles, and maintain the machinery and equipment needed for grinding, polishing, edging, beveling, drilling, and mounting lenses. If they do their own dispensing of glasses for their patients, they therefore turn to wholesalers, such as the branches of the defendant American, to have their prescriptions filled, whether such prescriptions involve replacing a single broken lens in a frame or making up a complete pair of spectacles.

23. Many Rx or prescription sales are made by branches of defendant American to optometrists or oculists located in States other than the one in which the branch making the Rx sale is located. Much of this interstate business is done by mail, with the optometrist or oculist mailing the prescription for his patient to the branch of the defendant American and American then mailing the filled prescription back to the customer, who then dispenses it to his patient.

24. The defendant American issues uniform Rx or prescription price lists to be followed by its branches when selling the products manufactured by American as well as those purchased from other manufacturers and shipped in interstate trade and commerce to the branches of the defendant American. The branches of the defendant American use and follow these price lists in making Rx or prescription sales and in making charges for sales in which Rx or prescription prices are involved.

25. Oculists charge their patients a fee for the professional service involved in making ophthalmic refractions and prescribing lenses for the correction of visual defects. Some oculists, principally those in smaller towns and communities, especially where no wholesalers operate, do their

[fol. 210] own dispensing of glasses for their patients. Oculists who follow this procedure have their prescriptions filled by a wholesaler who charges the oculist the Rx or prescription price.

26. Most oculists, however, particularly those in the larger communities where wholesalers are located, do little, if any, dispensing of glasses. They make ophthalmic refractions, prescribe lenses, and charge their patients a fee for such services. The patients then go to a wholesaler or to a retail optician to have the prescription filled and dispensed.

27. The defendant American, through many of its branches, engages in wholesale dispensing for the patients of those oculists who do little, if any, of their own dispensing. In doing wholesale dispensing, the branches of the defendant American fill prescriptions for lenses, fit and adjust spectacles to the patient's face, and collect from the patient a consumer price for the prescribed spectacles or parts thereof. This consumer price is usually more than double the amount of the Rx or prescription price. The defendant American then rebates to or "credits" the doctor who wrote the prescription with part of the purchase price paid by the patient, this rebate usually amounting to approximately one-half the price collected from the patient.

28. In many cases the defendant American, instead of delivering spectacles or parts thereof to the patient in person, mails them to the patient and collects the consumer price from the patient on a C. O. D. basis. Frequently such C. O. D. collections are made from patients located in States other than the State in which the branch of the defendant American mailing the package is located.

29. Checks for rebates or "credits" are mailed from zone or regional offices of the defendant American to defendant doctors located in States other than the States in which such zone or regional offices are located. Thus, the Chicago zone covers branches in 8 States; the Atlanta zone, branches in 6 States; the Memphis zone, branches in 2 States; the Dallas zone, branches in 1 State; the Kansas City zone, branches in 10 States; the San Francisco zone, branches in 7 States and the Territory of Hawaii; the Boston zone, [fol. 211] branches in 6 States; and the New York zone, branches in 8 States and the District of Columbia.

30. The doctor receiving the rebate or "credit" has already charged a fee to the patient for the professional service rendered in connection with the ophthalmic examination. The defendant American, in making the rebate to the doctor, retains out of the consumer price collected from the patient only the Rx or prescription price plus a fee (known as a fitting fee) for the services incident to handling the dispensing.

V

OFFENSE CHARGED

31. Since in or about the year 1938, and continuing to and including the date of the filing of this complaint, the defendants, well knowing the facts herein alleged, have been engaged in a continuing and unlawful combination and conspiracy to fix the consumer price of spectacles and parts thereof sold to patients of defendant doctors, which combination and conspiracy has been and is now in restraint of interstate trade and commerce in such spectacles and parts thereof in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended (15 U. S. C. 1), commonly known as the Sherman Act.

32. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, the substantial terms of which have been:

(a). That the defendant American through its dispensing branches, sells spectacles and parts thereof on prescription directly to the patients of defendant doctors and collects a consumer price therefor from such patients which shall be the sum of the Rx or prescription price of the spectacles or parts thereof plus a fitting fee plus a substantial amount for a rebate or "credit" to the defendant doctor who prescribed for the patient;

[fol. 212] (b) That the total consumer price to be charged patients of defendant doctors by a dispensing branch of defendant American shall be at least as high as the local prevailing consumer prices charged by

optometrists and retail opticians for spectacles or parts thereof of equivalent quality;

(c) That the defendant American rebate to or "credit" defendant doctors with the difference between the Rx or prescription price plus fitting fees, and the aforesaid prices collected from such patients by defendant American, and that defendant doctors accept such rebates or "credits," which are customarily approximately one-half of the consumer price collected from the patient;

(d) That the defendant American boycott and refuse to sell spectacles and parts thereof to patients of doctors who turn over rebates to their patients, or who insist that consumer charges made to their patients by defendant affiliates be reduced by the amount of the rebate which would otherwise be paid to the doctor;

(e) That the defendants refrain from disclosing to patients of defendant doctors the Rx or prescription prices of spectacles or parts thereof, the fact that the prices charged to said patients by the defendant American includes an amount which is rebated to said defendant doctors, or the amount of such rebate.

33. The defendants will continue the offense herein charged unless the relief hereinafter prayed for is granted.

34. The aforesaid combination and conspiracy has been effectuated by the following means and methods:

35. During the period covered by this complaint, the defendant American has made stock and Rx or prescription sales to optometrists in a volume far exceeding the volume of sales made to patients or defendant doctors, and has also made considerable stock sales to retail opticians.

36. Defendant American has sought to maintain the good will of optometrists and retail opticians who are its customers [fol. 213] by entering into agreements with defendant doctors to (a) maintain the consumer price of spectacles and parts thereof sold by defendant American to patients of defendant doctors, at levels at least as high as the prevailing local level of consumer prices charged by optometrists and retail opticians for spectacles and parts thereof of equivalent quality; and (b) conceal from consumer purchasers the fact that consumer prices for spectacles and

parts thereof are fixed at levels high enough to enable defendant American, as vendor, to give defendant doctors rebates of approximately one-half the consumer price paid by their patients.

37. The defendant American, during the time covered by this complaint, has entered into agreements and understandings with the defendant doctors under which the defendant American has agreed through its dispensing branches (1) to fill prescriptions for lenses brought in by patients of the defendant doctors; (2) sell such patients spectacles and parts thereof under such prescriptions; (3) establish, for each dispensing branch of defendant American, consumer prices which would be substantially uniform for the patients of all defendant doctors served by such branch, be at least as high as the prevailing local level of consumer price charged by optometrists and retail opticians for spectacles and parts thereof of equivalent quality, and be sufficiently high to include a substantial rebate or "credit" to the defendant doctor who prescribed for the patient, which rebate would be approximately one-half of the consumer price charged to patient; (4) refuse to charge patients of any doctor a consumer price which does not include a substantial sum for rebate to the doctor in addition to the Rx or prescription price plus a fitting fee; (5) collect said consumer prices from patients of the defendant doctors for spectacles and parts thereof sold to such patients; (6) rebate to or "credit" the prescribing doctors with the amount so collected from their patients in excess of the Rx or prescription price plus a fitting fee; (7) keep secret from the patient the Rx or prescription [fol. 214] price of the spectacles or parts thereof purchased by the patient under prescription, the fact that the prices charged such patient include an amount which is rebated to said defendant doctors, and the amount of such rebate.

38. The defendant doctors, during the time covered by this complaint, have entered into agreements and understandings with the defendant American under which the defendant doctors have agreed (1) to refer patients to dispensing branches of defendant American to have their prescriptions filled or to recommend the defendant American to their patients for such purpose; (2) accept from the defendant American a rebate or "credit" of the excess

above the Rx or prescription price plus fitting fee collected by the defendant American from patients of prescribing defendant doctors; (3) refrain from turning such rebates over to their patients; and (4) refrain from disclosing to their patients the Rx or prescription price of spectacles or parts thereof purchased from the defendant American.

39. The defendant American, pursuant to the foregoing agreements and understandings, has (1) sold spectacles and parts thereof on prescription to the patients of the defendant doctors; (2) collected from such patients consumer prices for spectacles or parts thereof approximately one hundred per cent higher than the Rx or prescription price of such ophthalmic goods, including a fitting fee; (3) rebated to or "credited" the prescribing defendant doctors with the amount collected from their patients in excess of the Rx or prescription prices, plus fitting fees; (4) refused to sell spectacles or parts thereof to the patients of doctors who pay over to their patients the amount of rebate received by the doctor on account of the sale of American of spectacles and parts thereof or who insist that consumer charges made to their patients by defendant affiliates be reduced by approximately the amount of the rebate which would otherwise be paid to the doctors; (5) refused to disclose to patients the Rx or prescription price of the spectacles and parts thereof sold to such patients, the fact that the prices charged such patients include an amount which is rebated to said defendant doctors, or the amount of such rebate.

[fol. 215] 40. The defendant doctors, pursuant to the foregoing agreements and understandings, have accepted the rebates tendered them by the defendant American of part of the price paid by patients of such doctors for spectacles and parts thereof, which rebates have amounted on the average to approximately one-half of the consumer price collected from the patients by the defendant American, refrained from disclosing to their patients the Rx or prescription price of the spectacles or parts thereof purchased by such patients from defendant American, or the fact that a rebate was paid to such doctor by the defendant American, and have refrained from paying over to their patients the amount of rebates received from the defendant American.

41. The defendant American supplies each defendant doctor with a detailed statement concerning each sale made

to each patient, on prescription, such statement providing the name of the patient, a description of the ophthalmic goods sold to such patients, the Rx or prescription price of such goods, the fitting fee, the consumer price collected from the patient, and the amount of rebate or "credit" due the defendant doctor on account of such sale made by the defendant American. Periodically the defendant American settles its accounts with the defendant doctors by sending them checks for accrued rebates or by crediting such accrued rebates against the purchase of equipment or stock by the defendant doctors. Each of the defendant doctors has accepted all rebates or "credits" made and has known that other defendant doctors were also participating in the foregoing agreements and understandings with the defendant American.

VI

Effect of Such Combination and Conspiracy

42. The aforesaid combination and conspiracy, and the agreements entered into, and the acts done in furtherance thereof have had the following effects:

- (a) Arbitrary and inflated consumer prices for spectacles and parts thereof have been fixed and maintained;
- [fol. 216] (b) Patients of defendant doctors have been forced to pay for spectacles or parts thereof consumer prices which have been inflated by the amount of the rebates or "credits" given by the defendant American to the defendant doctors;
- (c) Rebates or "credits" have been paid to defendant doctors which amount on the average to approximately one-half the consumer price paid by patients of defendant doctors to defendant American for spectacles or parts thereof. The amount of such rebates or "credits" in representative actual transactions is shown in Schedule A attached hereto and made a part hereof;

- (d) Defendant doctors have acquired a pecuniary interest in maintaining the price of spectacles and parts thereof at excessive and artificial levels, notwithstanding that defendant doctors have already received

professional fees from their patients for services rendered. The amount of such pecuniary interest on the part of the defendant doctors is illustrated by Schedule B attached hereto and made a part hereof, setting forth the amount of the rebates paid during 1944 and 1945 by the defendant American to the individual defendant doctors named herein;

(e) Interstate trade and commerce in spectacles and parts thereof has been unreasonably restrained in violation of Section 1 of the Sherman Antitrust Act.

Prayer

Wherefore plaintiff prays:

1. That the aforesaid combination and conspiracy in restraint of interstate trade and commerce in spectacles and parts thereof be adjudged and decreed to be unlawful, and that the agreements, understandings, and practices alleged in this complaint be adjudged and decreed to be in violation of the Sherman Act.
2. That the defendant American and its officers, employees, representatives, and agents be enjoined perpetually [fol. 217] from directly or indirectly making any rebates or granting any "credits" to defendant doctors, through agents or representatives, of any part of the purchase price paid by patients of such doctors, to the defendant American for spectacles or parts thereof purchased on prescription, whether such rebate or "credit" is given directly as by cash or check, or is given indirectly by applying the amount of the rebate or "credit" against the purchase by the oculist of stock or equipment, or by payment to a charity or other person or organization designated by the doctor, or by any other method.
3. That defendant doctors be enjoined perpetually from participation in any plan or program with any wholesaler whereby said doctors receive, directly or indirectly, any part of the purchase price of spectacles or parts sold by said wholesaler to patients of said doctors.
4. That the defendant American, for a period of three years from the entry of the decree herein, be enjoined, as to its branches doing dispensing at the time this complaint

was filed, from refusing to sell spectacles or parts thereof on prescription to the patients of any doctors, at the defendant American's Rx or prescription prices, plus the fitting fee prevailing in the dispensing branch at the time this complaint was filed.

5. That the defendant American be perpetually enjoined from refusing to make stock and Rx or prescription sales of spectacles and parts thereof to doctors who, in doing their own dispensing, sell spectacles or parts thereof to their patients at less than the local prevailing level of consumer prices charged by optometrists.

6. That pursuant to Section 5 of the Sherman Act, an order be made and entered herein, requiring such of the defendants as are not within this District to be brought before the Court in this proceeding as parties defendant, and directing the Marshals of the Districts in which they severally reside to serve summons upon them.

[fol. 218] 7. That the plaintiff have such further, general and different relief as the nature of the case may require and the Court may deem proper in the premises.

George B. Haddock, Melville C. Williams, Willis L. Hotchkiss, Special Assistants to the Attorney General.

Tom C. Clark, Attorney General, Wendell Berge, Assistant Attorney General, Holmes Baldridge, Special Assistant to the Attorney General, J. Albert Woll, United States Attorney, Suite 820, 208 South LaSalle Street, Chicago 4, Illinois.

Schedule A

Representative transactions involving the sale of spectacles or parts thereof by a dispensing branch of defendant American to patients of defendant doctors, showing:

(a) Rebate or "credit" paid to a defendant doctor on account of the transaction;

(b) Consumer price collected from the patient by the dispensing branch of defendant American;

(c) Rx or prescription price of the spectacles or parts thereof retained by the defendant American;

together with identification number of the transaction, the date the sale was made, and the location of the branch of the defendant American making the sale.

[fol. 219]

Defendant American Branch Rx number	Date of sale	Consumer price collected from patients	Rx or prescription price (including fitting fee)	Rebate or "credit" paid to a defendant doctor
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Transactions From Chicago Branches of Defendant American

38816	6/30/44	\$14.00	\$2.50	\$11.50
38687	6/29/44	12.00	4.65	7.35
38988	7/ 5/44	7.25	2.85	4.40
38502	6/27/44	9.25	6.05	3.20
37660	7/ 5/44	25.00	10.80	14.20
38684	6/15/44	10.00	3.80	6.20
38519	6/28/44	12.25	6.45	5.80
38567	6/18/44	13.50	7.55	5.95
38676	6/29/44	13.00	6.10	6.90
38688	6/29/44	13.00	6.20	6.80
38983	7/ 5/44	7.00	4.70	2.30
38746	7/ 6/44	3.50	1.25	2.25
38817	6/30/44	2.75	1.30	1.45
38878	7/ 1/44	3.64	1.52	2.12
38887	6/30/44	3.00	2.75	.25
38954	7/ 1/44	16.00	6.85	9.15
39003	7/ 5/44	12.25	4.85	7.40
39064	7/ 5/44	1.00	.50	.50
39071	7/ 5/44	4.50	2.15	2.35
39076	7/ 5/44	3.50	2.35	1.15
39109	7/ 5/44	13.00	5.95	7.05
39130	7/ 5/44	8.00	3.45	4.55
39179	7/ 6/44	3.25	1.15	2.10
39180	7/ 6/44	5.00	3.00	2.00
39372	7/ 2/44	2.50	1.65	.85
39418	7/ 7/44	2.00	1.25	.75
61363	7/ 1/44	5.00	1.73	3.27
61424	7/ 1/44	18.00	8.22	9.78
61470	7/ 8/44	24.00	12.00	12.00
61580	7/18/44	10.00	4.95	5.05
37536	6/17/44	7.50	3.80	3.70
38006	6/24/44	25.00	12.35	12.65
38061	7/ 1/44	25.00	10.65	14.35
38144	7/ 6/44	11.00	4.60	6.40
38159	6/24/44	10.00	4.10	5.90
38170	6/13/44	15.00	9.05	5.95
38179	6/15/44	17.00	7.65	9.35
38274	6/26/44	15.00	7.30	7.70
59342	2/ 1/45	8.00	2.40	5.60
59349	2/ 1/45	15.00	5.30	9.70
59864	2/ 1/45	15.00	10.50	4.50
59371	2/ 1/45	16.50	8.25	8.25
59372	2/ 1/45	1.50	1.00	.50
59381	2/ 1/45	3.00	1.30	1.70
59382	2/ 1/45	4.00	1.55	2.45
59460	2/ 2/45	12.00	6.40	5.60
59494	2/ 2/45	13.00	5.95	7.05
59558	2/ 5/45	7.25	2.85	4.40
59559	2/ 5/45	10.00	5.45	4.55

59565	2/ 5/45	16.00	7.55	8.45
59570	2/ 5/45	6.50	2.85	3.65
59571	2/ 5/45	11.50	5.70	5.80
59647	2/ 5/45	15.00	6.25	8.75
59648	2/ 5/45	18.00	8.80	9.20
59694	2/ 6/45	25.00	12.00	13.00

[fol. 220]

Defendant
American Branch
Rx number

Defendant American Branch Rx number	Date of sale	Consumer price collected from patients	Rx or prescription price (including fitting fee)	Rebate or "credit" paid to a defendant doctor
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Transactions From Dallas, Tex., Branch of Defendant American

1028	2/ 1/45	\$26.00	\$13.25	\$12.75
679	1/29/45	18.00	8.25	9.75
678	1/29/45	15.00	7.40	7.60
1729	2/ 1/45	17.00	8.25	8.75
1929	2/ 1/45	16.00	7.85	8.15
1697	2/ 2/45	6.00	3.20	2.80
2023	2/ 2/45	21.00	10.75	10.25
2148	2/ 2/45	19.00	11.85	7.15
2286	2/ 3/45	18.00	8.55	9.45
2337	2/ 3/45	8.00	4.20	3.80
2355	2/ 3/45	15.00	8.55	6.45
2672	2/ 5/45	14.00	6.90	7.10

Defendant
American Branch
Rx number

Defendant American Branch Rx number	Date of sale	Consumer price collected from patients	Rx or prescription price (including fitting fee)	Rebate or "credit" paid to a defendant doctor
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Transactions From Oklahoma City, Oklahoma Branch of Defendant American

38016	2/ 2/45	\$26.00	\$12.30	\$13.70
38000	2/ 2/46	10.00	3.70	6.30
37812	2/ 2/46	17.00	7.25	9.75
37853	2/ 2/45	3.50	1.55	1.95
37829	2/ 2/45	17.00	7.20	9.80
37808	2/ 2/45	24.00	11.00	13.00
38012	2/ 2/45	8.00	2.70	5.30
37954	2/ 2/45	9.00	4.65	4.35
37943	2/ 1/45	22.00	9.10	12.90
37791	2/ 2/45	15.00	9.10	5.90
37934	2/ 2/45	3.50	1.95	1.55
37979	2/ 2/45	3.00	1.30	1.70

[fol. 221]

SCHEDULE B

Rebates or "Credits" Paid by Defendant American During 1944 and 1945
to Defendant Doctors Named in this Complaint

Name of defendant doctor receiving rebates	Address	Rebates paid by defendant American [rebates made in 1944 designated (*); those not so designated were made in 1945]
	Illinois	
Noah Fox	Chicago	\$4,012.75*
G. H. Mundt	Chicago	1,856.85*
Av. J. Blickenstaff	Peoria	9,319.90*
	Iowa	
Steve A. O'Brien	Mason City	21,795.86
Loran M. Martin		
Herman C. Kluever	Fort Dodge	42,107.03
Chas. H. Coughlin		
	Kansas	
Frank C. Boggs	Topeka	15,898.06
M. E. Brownell	Wichita	11,516.27
W. O. Quiring	Hutchinson	15,672.13
	Louisiana	
J. D. Woolworth	Shreveport	13,525.45
N. T. Simmonds	Alexandria	14,634.93
	Missouri	
E. J. Curran	Kansas City	18,436.71
Joseph S. Summers	Jefferson City	13,044.15
	Oklahoma	
Wm. Orlando Smith	Tulsa	13,659.33
	Texas	
John J. Crume	Amarillo	20,523.75
Frederic J. Crumley		
Bernard B. Friedman	Corpus Christi	12,777.56
Fred R. Landon	Wichita Falls	14,751.42
	Wisconsin	
H. J. Heeb	Milwaukee	12,806.32*
Reinhold O. Ebert	Oshkosh	9,704.27*
	Wyoming	
Erwin W. Newmark	Cheyenne	13,832.64
Total		\$277,676.38

[fol. 222] PROCEEDINGS IN THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

No. 6204

THOMAS B. LILLY and HELEN W. LILLY, Petitioners,
versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decisions of The Tax Court of the
United States

December 7, 1950, the transcript of record is filed and
the cause docketed.

Same day, certified copy of order extending to December
15, 1950, the time for the preparation, transmission and
delivery of the record on review is filed.

December 12, 1950, the appearance of Theron Lamar
Caudle, Assistant Attorney General, and Ellis N. Slack,
Special Assistant to the Attorney General, is entered for
the respondent.

December 23, 1950, the appearance of Richard E. Thigpen
is entered for the petitioners.

[fol. 223] December 26, 1950, the appearance of Charles
Oliphant, Chief Counsel, and John M. Morawski, Special
Attorney, Bureau of Internal Revenue, is entered for the
respondent.

January 5, 1951, motion of Association of Independent
Optical Wholesalers, consented to by counsel for the re-
spective parties, for leave to file brief as *amicus curiae*, is
filed.

ORDER PERMITTING ASSOCIATION OF INDEPENDENT OPTICAL
WHOLESALEERS TO FILE BRIEF AS *AMICUS CURIAE*—Filed and
Entered January 5, 1951

(Style of Court and Title Omitted)

Upon the motion of the Association of Independent Opti-
cal Wholesalers, by their counsel, Lehrich and Lehrich, for
leave to file brief as *amicus curiae* in the above-entitled case,
and it appearing that counsel for the respective parties
have consented thereto.

Leave is hereby granted the said Association of Independent Optical Wholesalers to file a brief as *amicus curiae* in the above entitled case, provided twenty-five (25) printed copies of same are filed and copies served upon counsel in the case at least twenty-three (23) days before the beginning of the March Term, 1951.

January 5th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 224] February 8, 1951, brief of the Association of Independent Optical Wholesalers as *amicus curiae* is filed.

February 15, 1951, brief for petitioners and appendix to brief are filed.

February 24, 1951, the original exhibits are certified up.

March 5, 1951, stipulation as to the time for the filing of respondent's brief is filed.

March 7, 1951, brief and appendices of respondent are filed.

Same day, the appearance of Lee A. Jackson and I. Henry Kutz, Special Assistants to the Attorney General, is entered for the respondent.

**MOTION OF PETITIONERS TO STRIKE APPENDIX A FROM
RESPONDENT'S BRIEF—Filed March 9, 1951**

(Style of Court and Title Omitted)

Comes now the petitioners, by their counsel, and moves the Court to have stricken from the Respondent's Brief, Appendix A thereto, because the content of said Appendix A forms no part of the record in this case, and the printing of said Appendix A is in violation of Section 10(4)(e) of the Rules of this Court, wherein it appears that

[fol. 225] 4. The brief of appellee or respondent shall contain:

(e) An Appendix containing such parts of the record as he desires the Court to read, and as have not been printed in the brief of appellant or petitioner.

Respectfully submitted, Richard E. Thigpen, Arthur M. Jenkins, Counsel for Petitioners.

Charlotte, North Carolina, March 8, 1951.



March 12, 1951, reply brief of the Association of Independent Optical Wholesalers as *amicus curiae* is filed.

Same day, memorandum in support of petitioners' motion to strike Appendix A from Respondent's Brief is filed.

ARGUMENT OF CAUSE

March 12, 1951 (March term, 1951), cause came on to be heard on the motion and the merits before Parker and Dobie, Circuit Judges, and Watkins, District Judge, and was argued by counsel and submitted.

[fol. 226] OPINION—Filed April 2, 1951

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6204

THOMAS B. LILLY and HELEN W. LILLY, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decisions of The Tax
Court of the United States

Argued March 12, 1951. Decided April 2, 1951.

Before Parker and Dobie, Circuit Judges, and Watkins,
District Judge

Richard E. Thigpen (Arthur M. Jenkins on brief) for Petitioner; and I. Henry Kutz, Special Assistant to the Attorney General, (Theron Lamar Caudle, Assistant Attorney General; Ellis N. Slack and Lee A. Jackson, Special Assistants to the Attorney General, on brief) for Respondent; and Lehrich & Lehrich on brief for The Association of Independent Optical Wholesalers as *Amicus Curiae*.

[fol. 227] Dobie, Circuit Judge:

This is an appeal from a decision of the Tax Court of the United States sustaining the disallowance by the Commissioner of Internal Revenue of certain alleged "trade discounts" claimed by Thomas B. Lilly and Helen W. Lilly

(hereinafter referred to as taxpayers), trading as the City Optical Company of Wilmington, North Carolina, totaling \$61,601.95 and \$60,021.65 for the years 1943 and 1944 respectively, and against Helen W. Lilly, trading as the Duke Optical Company, in the amounts of \$6,568.87 and \$4,798.35 for the years 1943 and 1944 respectively.

The facts are not disputed. Taxpayers, who are engaged in the business of grinding, fitting and selling eye glasses and spectacles, entered into oral contracts with various oculists whereby taxpayers agreed to pay the oculists one-third of the retail price of all eye glasses and spectacles purchased by patients sent to them by the oculists. The evidence shows that the oculists did not inform their patients of this rebate arrangement but such a disclosure was made only when it was specifically requested by individual patients.

The sole issue in this case is whether these rebates paid by taxpayers to the doctors were deductible under §23(a) (1)(A) of the Internal Revenue Code, 26 U.S.C.A. §23(a) (1)(A), as "ordinary and necessary" business expenses.

We feel that the answer to this must be in the negative. As the courts have frequently said, the allowance of a deduction is a matter of legislative grace and not a matter of right. *Deputy v. duPont*, 308 U.S. 488, 60 S. Ct. 373, 84 [fol. 228] L. Ed. 416; *White v. United States*, 305 U.S. 281, 59 S. Ct. 179, 83 L. Ed. 172; *City Ice Delivery Co. v. United States*, 4 Cir. 176 F. 2d. 347. Once, therefore, the Commissioner has made a determination against deductibility, the burden is upon the taxpayer to prove the Commissioner wrong. *Welch v. Helvering*, 290 U.S. 111, 54 S. Ct. 8, 78 L. Ed. 212.

The wording of the statute that in order to be deductible, an expense must be "ordinary and necessary" is sufficiently broad to require interpretation by the courts. As we said in *City Ice Delivery Co. v. United States*, 176 F. 2d. 347, 350: "These be rather strong adjectives which the courts have often been called upon to define and apply." Through this process of judicial interpretation has been evolved the rule that no deduction should be allowed as "ordinary and necessary" which violates sharply defined public policy. *Commissioner v. Heininger*, 320 U.S. 467, 64 S. Ct. 249, 88 L. Ed. 171; *National Brass Works v. Commissioner*, 9 Cir., 182 F. 2d. 526; *Commissioner v. Longhorn Portland Cement Co.*, 5 Cir., 148 F. 2d. 276; *Rugel v. Commissioner*, 8 Cir., 127 F.

2d. 393. We must examine these kickbacks in the light of this rule.

This court is not at all impressed with the argument that such an inquiry amounts to judicial legislation, for we are only interpreting what Congress meant by the use of the words "ordinary and necessary." As Mr. Justice Black said in *Commissioner v. Heininger*, 320 U.S. at page 473:

"The Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have from time to time, however, narrowed the generally accepted meaning of the language used in §23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct."

In *Winfield, Public Policy In The English Common Law*, 42 Harv. L. Rev. 76 (1928), the author states (p. 97):

"But the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so. The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics rather than of law. The basis for their decision is 'the opinions of men of the world, as distinguished from opinions based on legal learning.' Of course it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is the judges themselves assisted by the bar, who here represent the highest common factor of public sentiment and intelligence."

"The relationship of patient and physician is to the highest possible degree a fiduciary one, involving every element of trust and confidence" *Stryker, Courts and Doctors*, (1932) p. 9.

To such a relationship, one *uberrimae fidei*, the oft-quoted words of Chief Judge (afterwards Mr. Justice) Cardozo, in *Meinhard v. Salmon*, 249 N.Y. 458, 464, are peculiarly applicable:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden

to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to [fol. 230] this there has developed a tradition that is unbending and inveterate."

Quite germane, too, is that statement in 6 Williston on Contracts, (Rev. Ed.), 4907:

"Clearly an agreement, for a secret consideration, to influence one with whom the promisor stands in a confidential relation is illegal. * * * or to influence one who may consult him in a confidential relation, * * *."

See, also, Amer. Law Inst. 2 Restatement, Contracts, §570. We certainly will not lend the force of any opinion of this court to sanction, as an "ordinary and necessary" expense of the optician's business, the making and carrying out of such unconscionable and reprehensible contracts for secret kickbacks to a doctor.

A doctor owes the duty of undivided loyalty to his patients, and a contract which violates this duty is unenforceable and opposed to public policy. One cannot at the same time serve two incompatible masters. *Wolfe v. International Reinsurance Corp.*, 2 Cir., 73 F. 2d. 267; *Reilly v. Beekman*, 2 Cir., 24 F. 2d. 791; *City of Findlay v. Pertz*, 6 Cir., 66 Fed. 427. *Reilly v. Beekman*; *supra*, was a suit for breach of contract. Beekman had agreed to pay Reilly one-half of all legal fees he collected from clients referred to him by Reilly. In holding the contract unenforceable, the court said (24 F. 2d. at page 794):

"It cannot be disputed that, if Reilly was in a fiduciary relation to Mrs. Trenkman when he recommended Beekman to her as her attorney, he could not agree to profit from the business arising out of the introduction without her knowledge and consent. This is because Mrs. Trenkman was entitled to his disinterested advice as to the attorney to be recommended to her. That [fol. 231] advice was not likely to be disinterested, if affected by the consideration of whether or not he could make a profit out of the recommendation of a particular person."

The evil we find in these kickbacks is the receipt by the physician of secret profits through dealings with his patients. Surely, the doctor is assuming an utterly inconsistent position when he recommends an optician without disclosing that he is being paid for the recommendation. This corrupt practice obviously involves, or tends to promote, serious evils: (1) the prescription by the doctor of glasses where not actually necessary; (2) more expensive lenses than really needed; (3) recommendation of an inferior optician; (4) artificial increase in the cost of glasses by the inclusion of the physician's commission, for which the physician affords no value to the patient. The bait of the secret consideration, which taxpayers offered to the doctor, hopelessly divides the trust interest of the doctor.

At least two states have thought this practice so insidious as to pass legislation forbidding it. See California Business and Professional Code §650 (Deering, 1949, Supp.); Revised Statutes of Washington, Anno., §10185-14 (Remington 1949 Supp.). We hold, since these kickbacks corrupt the fiduciary relationship between physicians and patient and result in a violation of the duty of loyalty, they are opposed to public policy and, therefore, are not deductible as "ordinary and necessary" business expenses by these taxpayers.

That these deductions are opposed to public policy is borne out by the standards set by the medical profession itself. We find among the Principles of Medical Ethics of the American Medical Association, Chapter III, Art. 1, §5, (1943), the following:

[fol. 232] "It is unprofessional to accept rebates on prescriptions or appliances, or perquisites from attendants who aid in the care of patients."

And in Chapter III, Art. VI, §4:

"When a patient is referred by one physician to another for consultation or for treatment, whether the physician in charge accompanies the patient or not, it is unethical to give or to receive a commission by whatever term it may be called or under any guise or pretext whatsoever."

The record and the opinion of the Tax Court also show that these kickbacks had been condemned by the Medical

Society of North Carolina—the State in which these taxpayers were chiefly engaged in business.

We are not impressed by the argument of counsel for taxpayers that this custom of secret kickbacks from opticians to doctors is so common and so widespread that such payment must be deductible because the Commissioner of Internal Revenue has issued no regulation specifying that such payments are not deductible. No decision precisely in point has been cited to us. Nor does the record disclose either that the Commissioner had been definitely apprised of this practice or that he had ever made any ruling on it. Certainly if other opticians, as did taxpayers here, camouflaged these payments as "trade discounts", there was little to put the Commissioner on notice that the deductions claimed were the secret kickbacks from optician to doctor.

Had taxpayers desired a specific ruling on this question by the Commissioner, this could easily have been obtained by a full and frank disclosure of the exact nature of these so-called "trade discounts." The Commissioner can hardly [fol. 233] be expected, by specific regulations, to cover every form of commercial practice.

The decision of the Tax Court of the United States is affirmed.

Affirmed.

[fol. 234] JUDGMENT—Filed and Entered April 2, 1951

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6204

THOMAS B. LILLY and HELEN W. LILLY, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On petition to review the decisions of The Tax Court of the United States.

This cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decisions of the said The

Tax Court of the United States, in this cause, be, and the same are hereby, affirmed.

April 2, 1951.

Armistead M. Dobie, U. S. Circuit Judge.

April 24, 1951, petition of petitioners for a stay of mandate is filed.

[fol. 235] ORDER STAYING MANDATE—Filed April 26, 1951

(Style of Court and Title Omitted)

Upon the petition of the petitioners, by their counsel, Richard E. Thigpen, Esq., and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Petitioners in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

April 25, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

May 26, 1951, motion for further stay of mandate is filed.

ORDER FURTHER STAYING MANDATE—Filed May 31, 1951

(Style of Court and Title Omitted)

Upon the motion of the petitioners, by their counsel, Richard E. Thigpen, Esq., and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, further stayed pending the application of the said petitioners in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

May 30th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 237]

STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. —

THOMAS B. LILLY and HELEN W. LILLY, Petitioners,
versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Subject to this court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of petitioners in the United States Court of Appeals for the Fourth Circuit.
2. Appendix B to brief of respondent in the United States Court of Appeals for the Fourth Circuit.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme [fol. 238] Court the complete certified record on review in the Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete record on review in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

June 13, 1951.

Randolph E. Paul, Louis Eisenstein, Counsel for Petitioners; Philip B. Perlman, Solicitor General, Counsel for Respondent.

[fol. 239]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss.:

I, Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of petitioners, Appendix B to brief of respondent and the proceedings in the said Court of Appeals in the therin entitled cause, as the same remain upon the records and files of the said Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for a writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Court of Appeals for the Fourth Circuit, at Asheville, North Carolina, this 20th day of June, A. D., 1951.

Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit. (Seal.)

(5711)

192

[fol. 234] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 158

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8078)